CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

vs.

MARIE ELIZABETH ELG

No. 455

MARIE ELIZABETH ELG, PETITIONER

vs.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONS FOR CERTIORARI FILED NOVEMBER 1, 1938
CERTIORARI GRANTED DECEMBER 5, 1938

SUPREME COURT OF THE UNITED STATES

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1 [Caption omitted.]

In United States District Court, District of Columbia

Equity No. 63408

MARIE ELIZABETH ELG, MT. KISCO, N. Y.

vs.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE

Bill of complaint

Filed January 14, 1937

The complaint of Marie Elizabeth Elg by Henry F. Butler, her attorney, respectfully alleges:

1. Plaintiff was born on October 2, 1907, in the City and State of New York, as appears by her birth certificate issued by the proper authorities, a copy whereof is hereto annexed marked "Exhibit A" and made a part hereof, and she is now residing at Mt. Kisco in Westchester County in the State of New York in the United States; during all of her life plaintiff has been a citizen of the United States, has never married and has never committed any act or executed any instrument or authorized anyone on her behalf to commit any act or execute any instrument of expatriation or renunciation of her American citizenship or which would or could affect that citizenship in any manner whatsoever.

2. The Defendant, Frances Perkins, is Secretary of Labor of the United States, and the Defendant Edward J. Shaughnessy, is Acting Commissioner of Immigration and Naturalization, and said defendants are charged with the execution of the laws relating to the immigration into, and the deportation from, the United States of aliens and the enforcement of the laws and statutes of the United States in connection therewith and in relation thereto, but neither of the said defendants has any jurisdiction whatever over, or in regard to, the exclusion or deportation from the United States of any citizen thereof.

3. The Defendant, Cordell Hull, is Secretary of State of the United States and is charged with and has jurisdiction over the issuing of passports to citizens of the United States. The Passport Division of the Department of State of which Ruth B. Shipley is chief, has the direct supervision of matters connected with the issuing of passports and the refusal to issue the same and the acts and written declarations of the Passport Division as done and issued by the Chief of the Passport Division are, to all legal effect and pur-

poses, the acts and declarations of the Defendant Hull and for which he is responsible as Secretary of State of the United States.

4. During the year 1928, before plaintiff was 21 years of age, she was residing with her parents in Sweden and, through one Valdemar Haneson, inquired of the proper authorities what course she should pursue in order to return to the United States where she was born and from which country, without her own volition or any action on her own part, she had been taken to Sweden when she was about four years of age, and plaintiff was informed in writing by the then Vice Consul of the United States at Göteborg, Sweden, through said Haneson, that if she returned to the United States before attaining the age of twenty-one years her birth certificate and identification papers were all the evidence that was needed for her re-entry therein, but that if she did not return until after attaining the age of twenty-one years, she should make application for an American passport, all of which plaintiff believes and alleges was in accordance with the law of the United States at all times as evidenced by a communication from said Vice Consul dated June 11, 1928, addressed to said Haneson, in a letter in the Swedish language, a copy of which and a translation thereof are hereto annexed marked "Exhibit B1 and B2" and made part hereof, and a communication dated October 29, 1935, from the American Consul at Göteborg to plaintiff's mother and referring to the issuance of the said passport and a translation thereof are also hereto annexed marked "Exhibits B3 and B4" and made part hereof.

5. After the receipt of the letter of said American Vice Consul of June 1, 1928 (Exhibit B1), and also after she had, on October 2, 1928, attained twenty-one years of age but within one year thereafter, on May 13, 1929, plaintiff, at the American Vice Consulate in Göteborg, Sweden, duly signed and on her oath verified, an application for a passport in the regular form provided by the Department of State of the United States in which she swore allegiance to the United States and stated that she desired to remain a citizen of the United States and intended to return thereto for permanent residence; said application set forth all the required facts including that she was a native-born citizen aged over twenty-one years; that her parents were at the time of her birth naturalized citizens of the United States and were living therein; that when she was four years of age she had been taken to Sweden; that her father had returned to Sweden in 1922 (seven years prior to the date of the application) for permanent residence and had ever since 1922 resided and at the date of the application was residing in Sweden; and that she had during that time been residing with him, all of which appears in said application which was transmitted by the American Vice Consul to the Department of State in Washington, D. C., where it is now
3 on file and a copy whereof is hereto annexed marked "Exhibit C" and made part hereof.

6. Thereafter, as plaintiff is informed and believes, the Secretary of State in writing instructed the American Vice Consul at Göteborg to issue to plaintiff a passport as an American native born citizen, but plaintiff cannot annex a copy of such instructions as the defendant Hull has refused to give plaintiff or her representatives a copy thereof or to allow an inspection thereof and plaintiff prays this court to direct defendant Hull to produce the original of said instruction on the trial of this action.

7. After receiving written instructions as aforesaid from the Secretary of State, the said American Vice Consul duly issued and delivered to plaintiff Passport No. 91, issued and dated July 22, 1929, and which has never been recalled or cancelled, certifying that she was a native born citizen of the United States a copy of which passport is hereto annexed marked Exhibit D and made part hereof, and the original of which will be produced on the trial of this action.

8. After receiving said passport, plaintiff on or about September 7, 1929, sailed from Sweden on the Steamer Gripsholm and arrived on September 17, 1929, at the port of New York where she disembarked and was admitted to the United States as a United States citizen and those facts were duly entered on the records of the Port of New York as appears by a letter of the Commissioner of Immigration and Naturalization hereto annexed marked Exhibit E and made part hereof.

9. On or about April 10, 1935, plaintiff received a written notice, dated April 8, 1935, from the United States Department of Labor to the effect that she was illegally remaining in the United States because she was not a citizen thereof, and ever since that date she has been subjected to proceedings instituted by the predecessor of defendant Shaughnessy and continued by him, to require her to promptly leave the United States or threatening, in case of her not so doing, that she would be deported therefrom as an alien improperly therein, and this notwithstanding plaintiff has proved to said defendant Shaughnessy and his predecessor in office that she is a native born citizen of the United States and has never by any act on her part expatriated herself therefrom; and as defendant Perkins and defendant Shaughnessy and his predecessor in office have refused to acknowledge her right as a native born American citizen to remain in the United States an actual controversy has arisen between the plaintiff and said defendants Perkins and Shaughnessy within the meaning of the Declaratory Judgment Act of June 14, 1934, as amended, and which this court has jurisdiction to determine. That such actual controversy does exist appears not only by this allegation but also by communications addressed to plaintiff copies of some of which are hereto annexed as follows: that above referred to in form of letter from Byron H. Uhl, District Director of the Immigration and Naturalization Service of the Department of Labor for the District of New York, and whose acts and written declarations are done and issued by authority of the Secretary of Labor and

the Commissioner of Immigration and Naturalization, dated April 8, 1935, copy of which is hereto annexed marked Exhibit F1 and made part hereof; plaintiff is also advised that notwithstanding the circumstances of her case were presented to certain persons in the Department of Labor, collectively known as the Board of Review, her attorneys on November 4, 1935, were notified "in view of the fact that the Swedish Foreign Office has stated that this woman (meaning the plaintiff) gained Swedish nationality after living in Sweden when her father reacquired Swedish citizenship, there is no reason why any change should be made in the outstanding decision" which was to the effect that she was illegally in the United States as an alien and subject to deportation as such therefrom; and plaintiff is further advised that the conclusions of said Board of Review are expressed in writing but are contained in the files of the Labor Department of the United States and copies thereof are not available but are in the possession of the defendants Perkins and Shaughnessy, and she prays that they may be required to produce the same on the trial of this action; and on July 3, 1936, plaintiff's attorney received a letter signed by J. H. Wagner by direction of the Commissioner of Immigration and Naturalization, dated July 2, 1936, to the effect that plaintiff would be allowed sixty days further for the purpose of presenting proof of her American citizenship, copy of which is hereto annexed, marked Exhibit F2, and made part hereof; and on October 14, 1936, plaintiff's attorney received a letter from W. W. Brown, Assistant to said Commissioner, written by direction of said Commissioner, dated October 13, 1936, stating that the District Director at Ellis Island, New York, had been instructed to take no steps looking to the enforced departure of the plaintiff prior to February 1, 1937, copy of which is hereto annexed, marked Exhibit F3, and made part hereof; plaintiff alleges that said proceedings have for their sole purpose her deportation from the United States on the ground that she is illegally remaining therein as an alien and, notwithstanding the postponement in the letters above referred to, said proceedings are still in full force and effect to her continuing great injury and annoyance and such proceedings can only be terminated by an order of a court of competent jurisdiction enjoining the defendants Perkins and Shaughnessy from further continuing the same.

10. On or about July 16, 1936, plaintiff duly filed an application for a passport as a United States citizen in the proper office and which was duly transmitted to the Department of State of the United States as appears by a copy thereof marked Exhibit G and made part hereof. As a native born citizen of the United States, who has not expatriated herself or done any act justifying the Secretary of State in refusing to issue the said plaintiff such passport, she is entitled to have the same issued to her. On July 29, 1936, however, plaintiff was informed by a letter addressed to her by the Chief of the Passport Division of the Department of State that her applica-

ion for such passport was denied, but solely on the ground that she had lost her native born American citizenship by reason of her father, Gustav Elg, having returned to Sweden on July 25, 1922 and remaining there until July 25, 1924, on which day under paragraph 1 of Section 2 of the Act of March 2, 1907, and the provisions of the Naturalization Convention of 1869 and the laws of Sweden as they existed on July 25, 1924, he had become naturalized as a Swedish citizen in conformity with the laws of Sweden, with the consequent loss of his American citizenship by naturalization, on July 25, 1924, as had also his minor American born children, residing with him in Sweden, including plaintiff as appeared by the written report of the Consul of the United States at Göteborg, Sweden. At the time the report on Gustav Elg's resumption of Swedish citizenship referred to in said letter was made, the plaintiff was residing in New York City, as appears by the letters of the Chief of Passport Division dated respectively July 29, September 25 and 26, 1936, and the report of the United States Consul, November 13, 1934, copies of which are hereto annexed, marked Exhibits H1, H2, H3, and H4, respectively and made part hereof; but plaintiff does not admit that the facts and conclusions of law as set forth in said exhibits are correct and expressly denies that the facts as stated justify the conclusion of law that she is now a citizen of the United States.

11. Such refusal to issue her a passport on the grounds alleged is not only a serious injury to plaintiff but has created an actual controversy between her and defendant Hull for whom the Chief of the Passport Division was authorized to, and did, act in such refusal to issue such passport and basing it solely on the ground of her loss of American citizenship. Such a controversy exists because, as plaintiff is informed and believes, defendant Hull has not only refused to issue a passport to plaintiff, solely on said ground, but has transmitted to defendants Perkins and to the Bureau of Immigration and Naturalization various documents, reports and opinions of members of the staff of the Department of State impugning and denying plaintiff's American citizenship, and on the authority of which plaintiff has reason to believe, and therefore alleges, defendants Perkins and Shaughnessy and his predecessor in office have based and are continuing to prosecute the proceedings having in view plaintiff's deportation from the United States.

12. The aforesaid action of defendants individually and jointly are resulting in great, continuing, and irreparable damage to plaintiff and causing her anxiety, trouble, loss of time and expense and will continue to do so unless, and until, her American citizenship shall be so established by the judgment of a court of competent jurisdiction, as is this court, that defendants Perkins and Shaughnessy cannot continue to annoy, molest, and cause expense to her by continuing the pending proceedings to have her deported from the United States and defendant Hull cannot continue to assert that she is not a citizen of the United States and refuse to issue her a pass-

port as such solely on that ground, all of which actions of defendants and each and all of them are wholly without any basis on, but are wholly contrary to, the law of the United States.

18. Plaintiff has greatly suffered and will continue to suffer great and irreparable wrong if defendants, or any of them, continue to deny that she is a citizen of the United States and endeavor to deprive her of the rights of such citizenship which are of a great and inestimable value far in excess of any amount necessary to give this court jurisdiction of this case brought by plaintiff to protect her rights which have been and are being curtailed and infringed by the defendants as heretofore set forth in this complaint.

6 Wherefore plaintiff prays this honorable Court—

1. To enter a Declaratory Judgment pursuant to the provisions of the Act of June 14, 1934, as amended, declaring and adjudging that she is a native born citizen of the United States and has never committed any act or executed any instrument of expatriation from the United States or renunciation of her citizenship thereof, nor has any such act or instrument been committed or executed on her behalf by any other person, and that she is entitled to all the rights and privileges of a citizen of the United States.

2. That defendant Perkins, individually and as Secretary of Labor and defendant Shaughnessy, individually and as Acting Commissioner of Immigration and Naturalization be, and each of them be, enjoined from instituting or continuing to prosecute any proceedings for the purposes of deporting plaintiff from the United States or in any way interfering with her residence therein.

3. That defendant Cordell Hull individually and as Secretary of State and all persons acting for him as such be enjoined from making any statements oral or written to any person or persons or to any public official to the effect that plaintiff is not a citizen of the United States and entitled to all the rights and privileges of such citizenship and from refusing to issue her a passport solely on the ground that she is not such a citizen.

4. And plaintiff also prays that inasmuch as defendants Perkins and Shaughnessy claim they have the right under the law of the United States at any time to issue an order of deportation and arrest against the plaintiff and may do so at any time after February 1, 1937, without further notice to her and it will be impossible for this case to be heard and determined before that date, and such action would cause plaintiff further great and irreparable injury, a temporary injunction issue out of this court against defendants Perkins and Shaughnessy, individually and as officers, enjoining them and each of them and all persons acting under them or either of them from any further action on their part in the proceedings already instituted and above referred to in this complaint for the deportation of the plaintiff and that such injunction continue until final judgment shall have been rendered in this action.

5. That the plaintiff may have such further relief as may be proper and just in the circumstances.

MARIE ELIZABETH ELG,
By HENRY F. BUTLER,
Attorney for the Plaintiff.

[*Duly sworn to by Marie Elizabeth Elg; jurat omitted in printing.*]

7 *Abstract of complaint*

Paragraphs 1, 2, and 3

Allege birth in United States, residence herein at present time, and denies any act of expatriation (Exhibit A, Birth Certificate), and sets forth official positions of defendants.

Paragraph 4

Sets forth how plaintiff was taken to Sweden during minority, residence of parents there, and information obtained in letters from American Consul as to her American citizenship (Exhibits B1, B2, B3, and B4).

Paragraphs 5, 6, 7, and 8

Set forth plaintiff's application through American Consul for passport (Exhibit C), and instructions of State Department for its issuance and issuance thereof (Exhibit D details of), and alleges arrival of plaintiff at port of New York on September 17, 1929, and admission as American citizen (Exhibit E).

Paragraph 9

Sets forth institution of proceedings for deportation of plaintiff, which she asks in this case to have enjoined (Exhibits F1, F2, F3), and asserts that controversy has arisen under Declaratory Judgment Act of 1934 between plaintiff and defendants Perkins and Shaughnessy.

Paragraphs 10 and 11

Set forth plaintiff's application in 1936 to Secretary of State for passport as American citizen (Exhibit G), his refusal to issue same on ground of non-citizenship of plaintiff (Exhibits H1, H2, H3, and H4); asserts that similar actual controversy has arisen between plaintiff and defendant Hull.

Paragraphs 12 and 13

Assert the great, continuing, and irreparable damage to which defendants have subjected and still are subjecting plaintiff.

Prayer

(1) To have a Declaratory Judgment that she is a citizen of the United States; (2) To enjoin defendants Perkins and Shaughnessy from further prosecuting deportation proceedings; (3) To enjoin defendant Hull from impugning or denying plaintiff's American citizenship; (4) To have an injunction pendente lite; and (5) To have other and proper relief.

3 *List of exhibits to complaint*

Paragraph 1, Exhibit A. Birth Certificate.

Paragraph 4, 5, Exhibit B1. Original letter (in Swedish) from Consul von Struve to Superintendent Haneson, June 11, 1928. Exhibit B2. Translation of B1. Exhibit B3. Original letter (in Swedish) from Consul Yates, October 29, 1935. Exhibit B4. Translation of B3.

Paragraph 5, Exhibit C. Plaintiff's application for passport, May 13, 1929.

Paragraph 7, Exhibit D. Plaintiff's passport, No. 91.

Paragraph 8, Exhibit E. Letter from Commissioner of Immigration and Naturalization, December 24, 1936, advising that New York port records show applicant's arrival, September 27, 1929, and admission as a United States citizen.

Paragraph 9, Exhibit F1. Letter of District Director Byron J. Uhl, advising plaintiff that she was illegally in United States. Exhibit F2. Letter of Commissioner of Immigration and Naturalization of July 2, 1936, extending time sixty days. Exhibit F3. Letter of Commissioner of Immigration and Naturalization of October 13, 1936, suspending proceedings until Feb. 1, 1937.

Paragraph 10, Exhibit G. Plaintiff's passport application, July 16, 1936. Exhibit H1. Letter of Chief of Passport of July 29, 1936, denying application on grounds of noncitizenship. Exhibit H2. Letter of Chief of Passport, September 25, 1936, enclosing report of Consul in regard to Gustav Elg's citizenship. Exhibit H3. Report of Consul Harnden regarding Gustav Elg's citizenship. Exhibit H4. Letter of Chief of Passport of September 26, 1936.

Exhibit A

CITY OF NEW YORK,
DEPARTMENT OF HEALTH, BUREAU OF RECORDS,
New York, N. Y., July 1, 1936.

Below is a photostatic copy of a certificate on file in the Bureau of Records of the Department of Health of the City of New York.

The City of New York, Department of Health. State of New York, Certificate and Record of Birth of, Name of child, Marie Elizabeth Elg, Sex, Female; Color, White; Date of Birth, Oct. 2d, 1907; Place of Birth, Street and Number, 293—18 St.; Father's Name, Gustav Elg; Father's Residence, 293—18 St.; Father's Birthplace, Sweden; Father's Age, 28 yrs.; No. of Certificate, 30097; Father's Occupa-

tion, Sailor; Mother's Name, Evelyn Elg; Mother's Name before Marriage, Evelyn Pattison; Mother's Residence, 293—18 St.; Mother's Birthplace, Sweden; Mother's Age, 26 yrs.; Number of Previous Children, None; How many now living (in all), 1; Name and address of person making this report, Signature.

WM. SILBERMAN, M. D.,
Residence, 701—4 Ave.

Date of Report, Oct. 10th, 1907. This is to certify the foregoing is a true copy.

THOMAS J. DUFFIELD,
Registrar of Records.

Signature illegible.
[OFFICIAL SEAL]

———— ————,
Ass't. Registrar of Records.

9 *Exhibit B1*

AMERICAN CONSULAR SERVICE,
Göteborg, den 11te juni, 1928.

REKTOR VALDEMAR HANESON,
Grebbestad.

Som svar på Edert brev av den 4 de juni, 1928, rörande en i Förenta Staterna född flickas önskan att återresa dit, ber jag få meddela följande:

Ifall Fröken Elg reser innan hon fyllt 21 år, behöver hon icke andra papper än sin Amerikanska födelseattest samt ett identifieringsdokument med fotografi.

Reser hon ej förr än efter fyllda 21 år, torte hon infinna sig personligen på detta onsulat för att inlägga ansökan om Amerikanskt pass. Hon bör då medhava:

Sin amerikanska födelseattest, och dopattest, om i besittning av sådan.

Ett identifieringsdokument med fotografi, utfärdat av prästen eller landsfiskalen, under dess sigill.

Tre passfotografier,

Konsulatsavgiften, Kr. 3.80.

Det vore även önskvärt att hon vid besöket å Konsulatet vore i besittning av upplysning om när hennes far emigrerade till Förenta Staterna, samt när och var han blev amerikansk medborgare, ifall han varit detta. Namn och adress på två personer i Förenta Staterna vilka ha kännedom om hennes födelse därstädes, torde även medhavas.

En tid av minst två månader måste väntas förflyta efter det hon infunnit sig på konsulatet, innan svar på hennes passansökan kan väntas anlända från Washington.

Högaktningsfullt,

(Signed) H. C. VON STRUVE,
H. C. von Struve,
Americansk Konsul.

130. KH.

Exhibit B2

[Translation]

AMERICAN CONSULAR SERVICE,
Göteborg, June 11, 1928.

Superintendent VALDEMAR HANESON,
Grebbestad.

Replying to your letter of June 4th, 1928, concerning the contemplated trip to the United States of a girl born there, I beg to inform as follows:

In the event that Miss Elg departs before she attains her twenty-first year, she will require no other papers than her American birth certificate together with an identification document with photograph.

Does she not leave until after attaining her twenty-first year, she may call personally at this Consulate to submit application for an American passport. She must then bring with her:

10 Her American birth certificate, or baptismal record, if in possession thereof;

An identification document with photograph, made out by a clergyman or county clerk, under their (hand and) seal;

Three passport photographs, and

Consular fee of Kr. 3.80.

It would be desirable also that on the occasion of her call at the Consulate she be in possession of information as to when her father emigrated to the United States, and as to when and where he became an American citizen, if that is the case. Also the names and addresses of two persons in the United States, who have knowledge as to her birth there, are desirable.

An interval of at least two months should be anticipated to transpire after her visit to the Consulate before a reply on the passport request can be expected from Washington.

Very truly yours,

H. C. VON STRUVE,
American Consul.

130. KH.

Exhibit B3

Ref. No. 130—LDY/KHL.

AMERICAN CONSULAR SERVICE,
Göteborg, den 29de oktober, 1935.

Fru EVELYN ELG,
Rörvik, Grebbestad.

Härmed erkännes Edert brev av den 28 ds. beträffande Edor dotter, Marie Elisabeth Elg.

Det meddelas härmed att de svårigheter Eder dotter nu erfar uppstått genom att tolkningen av vissa lager och bestämmelser med avseende på medborgarskap numera ändrats. Då Eder dotter i 1929

reste till Förenta Staterna ansågs det att varje person som var rödd i Förenta Staterna utan tvivel var amerikansk medborgare, obeaktet faderns medborgarskap. Hon erhöll således ett amerikanskt pass för sin resa. Emellertid anses det numera att en hinderårig som enligt svensk lag följer sin faders medborgarskap och med honom blivit svensk medborgare då har återtagit svenskt medborgarskap, då samtidigt förlorar sin rätt till amerikanskt medborgarskap, trots sin födelse i Förenta Staterna. Enligt nuvarande tolkning skulle Eder dotter således icke haft rättighet att å bervända till Förenta Staterna på att amerikanskt pass, enär hon blivit svensk medborgare samtidigt somsin för 1924.

Då passet utfär dades av detta Konsulat efter bemynidgande av Department of State, Washington, kan Konsulatet tyvärr icke bistå med något yttrande om de åtgär der som kunna vidtagas av Eder dotter, utan bör hon tillskriva the Secretary of State, Washington, D. C., med begäran om utredning i ärendet.

Högaktningsfullt,

(Signed) LLOYD D. YATES,
Amerikansk Konsul.

Bil: Brev i retur.

11 *Exhibit B4*

[Translation]

AMERICAN CONSULAR SERVICE,
Göteborg, October 29, 1935.

MRS. EVELYN ELG,
Rörvik, Grebbestad.

The receipt of your letter of the 28th instant in the matter of your daughter, Marie Elisabeth Elg, is hereby acknowledged.

You are hereby informed that the difficulties your daughter is now experiencing have arisen because of the fact that the interpretation of certain law and decisions as regards citizenship have undergone a change. When your daughter went to the United States in 1929, it was considered that any person born in the United States would undoubtedly be an American citizen, irrespective of the father's allegiance; thus, an American passport for the trip was issued to her. Since then, it has been decided that a minor should, in accordance with Swedish law, follow the father's allegiance and thus together with him, become a Swedish subject upon retrieving the Swedish allegiance, inasmuch as the American citizenship is simultaneously lost notwithstanding a birth in the United States. Your daughter should, therefore, in accordance with the present interpretation, no longer be entitled to a return to the United States on an American passport, as she became a Swedish subject together with her father in 1924.

In view of the fact that passports are issued by this Consulate only after receipt of authorization from the Department of State in

Washington, this Consulate is at this time unable to contribute any opinion as to what your daughter might do in the matter but would advise her to write to the Secretary of State, Washington, D. C, asking for a final opinion.

Very truly yours,

LLOYD D. YATES,
American Consul.

Enc.: Returned letter.

Exhibit D

Front cover: Passport (seal of the United States) United States of America.

Inside front cover: Present this passport with your application for a new passport. Notice.—The bearer should sign his name below as directed. He should also sign the passport in the space provided therefor at the bottom of page three.

Marie Elisabeth Elg, Signature of bearer, 663–78 St.

Bearer's address in the United States, Brooklyn, N. Y.

Rörvik pr. Grebbstad, Sverige, Bearer's foreign address. 663-78 Brooklyn, N. Y.

In case of death or accident notify Johan S. Elg, Name of person to be notified, 663 78 St., Brooklyn, N. Y., Exact address.

CAUTION.—This passport is a valuable document. Due care should be taken to see that it does not pass into the possession of an unauthorized person. If it is lost or destroyed the fact and circumstances of the loss should be immediately reported to the Pass-
12 port Division, Department of State, or to the nearest American Consulate, and to the local police authorities. New passports in such cases can be issued only after exhaustive inquiry. 1–1167.

Page 1. No. 91. Passport.—Consulate of the United States of America at Göteborg, Sweden. Service #960. Fee $9.00 sg. Kr. 33.66 American Foreign Service $9.00 Fee Stamp, cancelled by consul's stamp. E 67041.

Page 2. I, the undersigned, Consul of the United States of America, hereby request all whom it may concern to permit safely and freely to pass, and in case of need to give all lawful aid and protection to Marie Elisabeth Elg, a citizen of the United States. The bearer is accompanied by his Wife, Minor children (American Consulate Seal). Given under my hand and the seal of the Consulate of the United States at Göteborg, Sweden, July 22, 1929. (sgd.) H. C. von Struve.

Page 3. Description of bearer. Height 5 feet 5 inches. Hair brown. Eyes gray. Distinguishing marks or feature: Place of birth New York, N. Y., U. S. A. Date of birth October 2, 1907. Occupation, domestic. Signature of bearer. (Blank on this page but on photograph on page 4.)

Page 4. Photograph of bearer. Signature on Photograph. Page 5. This passport is good for travel in all countries unless otherwise

OATH OF ALLEGIANCE

I, Anna Elizabeth Ely (Signature in full of applicant)

[seal] Subscribed and sworn to before me this 13th day of May, 1929.

H. C. Bier
Vice Consul of the United States of America at Gothenburg, Sweden.

DESCRIPTION OF APPLICANT

Height: 5 feet, 8 inches. Sex: F
Male: BROWN Eyes: GREY
Distinguishing marks or features: XX

Place of birth: New York, N.Y., U.S.A.
Date of birth: October 2, 1897.
Occupation: Housework.

(Identifying documents submitted on behalf of applicant: Photostatic copy of Birth Record issued at New York on Dec. 20, 1928. (To Pass) Baptismal Certificate. Identifying affidavit bearing photograph. Cert. of Naturalization of Father. (All veiled)

witnesses: Mrs. Elias Noll, 626 Orington Ave., Brooklyn, N.Y.
Mrs. Emelie Svensson, 928 Ellsworth Ave., Bronx, New York City, N.Y.

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a subject of Sweden, that I reside at the address written below my signature hereto affixed; that I know the applicant who executed the declaration set forth in his citizen of the United States; that the statements made in the applicant's affidavit are true to the best of my knowledge and belief; further,

I solemnly swear that I have known the applicant personally for 20 years.

(Signature of witness) Anna Hardy
Mrs. Anna Hardby,
(Residence address of witness) Riskagatan 15, Gothenburg, Sweden.

[seal]

Subscribed and sworn to before me this 13th day of May, 1929.

H. C. Bier
Vice Consul of the United States of America at Gothenburg, Sweden.

The applicant requests that the following person be notified in the event of his death or disability:
Father: Mr. Gustav Ely, Rörvik, Grebbestad, Sweden.
(Name) (Address)

Additional data: Location of real and personal property, nature and place of investments, location of will, or estate. (It is optional with the applicant to give this information.)
XX

Registration (approved / disapproved) by the Department of State on (Date)

A certificate of registration issued to the applicant.

(Signature of consular officer)

Passport will be issued(1) after three months unless sooner withdrawn by the applicant or until further order.

REMARKS:

(Date)

limited. This passport is valid for two years from the date of issue unless limited to a shorted period. It is not subject to extension beyond a period of two years from the date of issue. This passport is limited to be valid for a period of six months only, and will expire on January 22, 1930. (Sgd.) H. C. von Struve, American Consul. (Seal of American Consulate.)

Page 6. Amendments and extensions. Nothing.

Page 7. Visas. (Red rubber stamp.) Up visat vid avresan dan 7 SEP. 1929. Polisen i Göteborg.

Pages 8–32. Visas. All blank.

Exhibit E

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
Washington, December 24, 1936.

Address reply to Commissioner of Immigration and Naturalization and refer to File Number 23/22894 Inf.

Mr. CHARLES HENRY BUTLER, *Attorney,*
Investment Building, Washington, D. C.

DEAR SIR: In reply to your letter of December 22, 1936, relative to Marie Elizabeth Elg, you are informed that the records at the port of New York show that Marie Elizabeth Elg arrived at that port on the Steamship "Gripsholm" September 17, 1929, and was admitted as a United States citizen.

Cordially yours.

By direction of the Commissioner.

HENRY B. HAZARD, *Assistant.*

13

Exhibit F1

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
New York, N. Y., April 8, 1935.

In replying please refer to this File Number 2–331860.

MARIE ELIZABETH ELG,
Chestnut Ridge Road, % George Butler, Mount Kisco, N. Y.

DEAR MADAM: Reference is made to your interview at this office on April 19, 1934, at which time you verified an affidavit setting forth all the facts regarding your birth, parents' citizenship and your residence in the United States and Sweden.

A subsequent investigation has been conducted in your case in connection with which your father was interviewed abroad. Your father made an affidavit to the effect that he voluntarily abandoned his permanent residence in the United States; that he had no desire to preserve his allegiance to the United States and intended and desired to preserve his allegiance to Sweden.

You are informed that the Department has concluded that your father became a Swedish subject on July 25, 1924, and since you were then residing in Sweden, you became a Swedish subject and forfeited all claims to American citizenship. The Department has directed that your entry on September 17, 1929, be not regarded as lawful for permanent residence for the reason that you were at that time an alien and were coming to this country for permanent residence and therefore you were subject to the quota laws then in effect and the requirements of the Immigration Act of 1924 requiring you to be in possession of a consular immigration visa. This office has been informed that it will be necessary for you to depart from the United States and thereafter effect an entry in compliance with the existing immigration laws. You are informed that the Service will afford you a reasonable opportunity and time to adjust your present unlawful status.

Will you kindly inform this office when it is your intention to depart from the United States?

The American passport and birth certificate which you left at this time at the time of your interview are returned herewith.

Very truly yours,

(S.) BYRON H. UHL,
Byron H. Uhl,
District Director.

14 *Exhibit F2*

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
Washington, July 2, 1936.

Address reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894 RV.

Mr. HENRY F. BUTLER.
Investment Building, Washington, D. C.

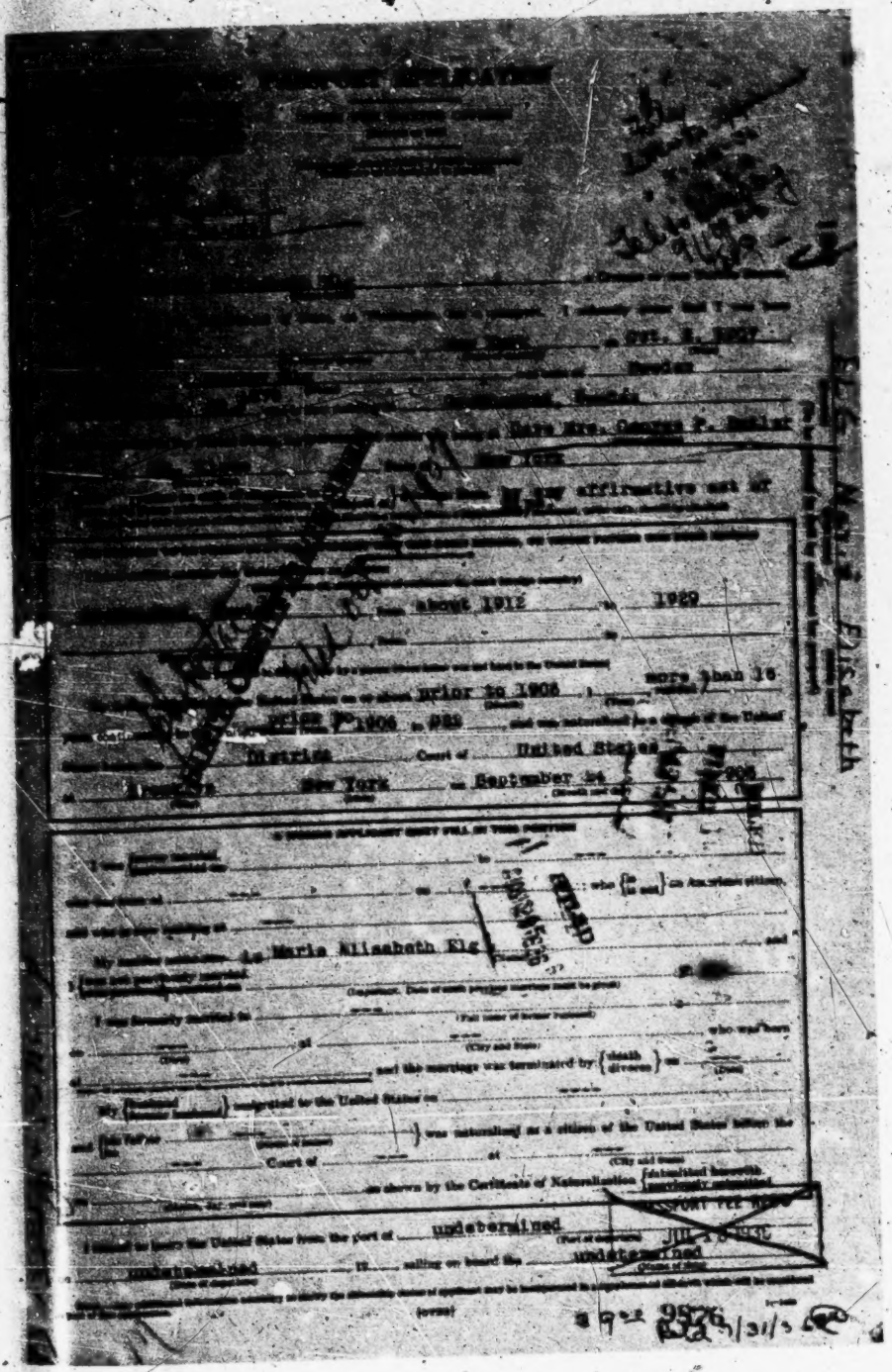
DEAR SIR: This office refers to your letter dated April 8, 1936, regarding the immigration status in the United States of Miss Marie Elizabeth Elg.

Miss Elg's case was made the subject of further consideration by this Service on the 10th ultimo, when it was noted that a period of approximately 60 days in which you might present proof of the subject's American citizenship had been given. In order that there may be sufficient time to present all evidence bearing upon the matter, a further period of 60 days from the date of this notice will be granted for the purpose of presenting proof relative to Miss Elg's American citizenship.

Cordially yours.

By direction of the Commissioner:

(Signed) J. H. WAGNER,
J. H. Wagner, *Assistant.*



Oct. 3, 1907

Mrs. Georgia P. Butler

I am affirmative out of

about 1912 to 1929

prior to 1908 more than 16

1908 1923

District Court of United States

New York September 24 1923

Maria Elisabeth Ely

undetermined

undetermined

JUL 10 1935

3922 9526 1/31/35

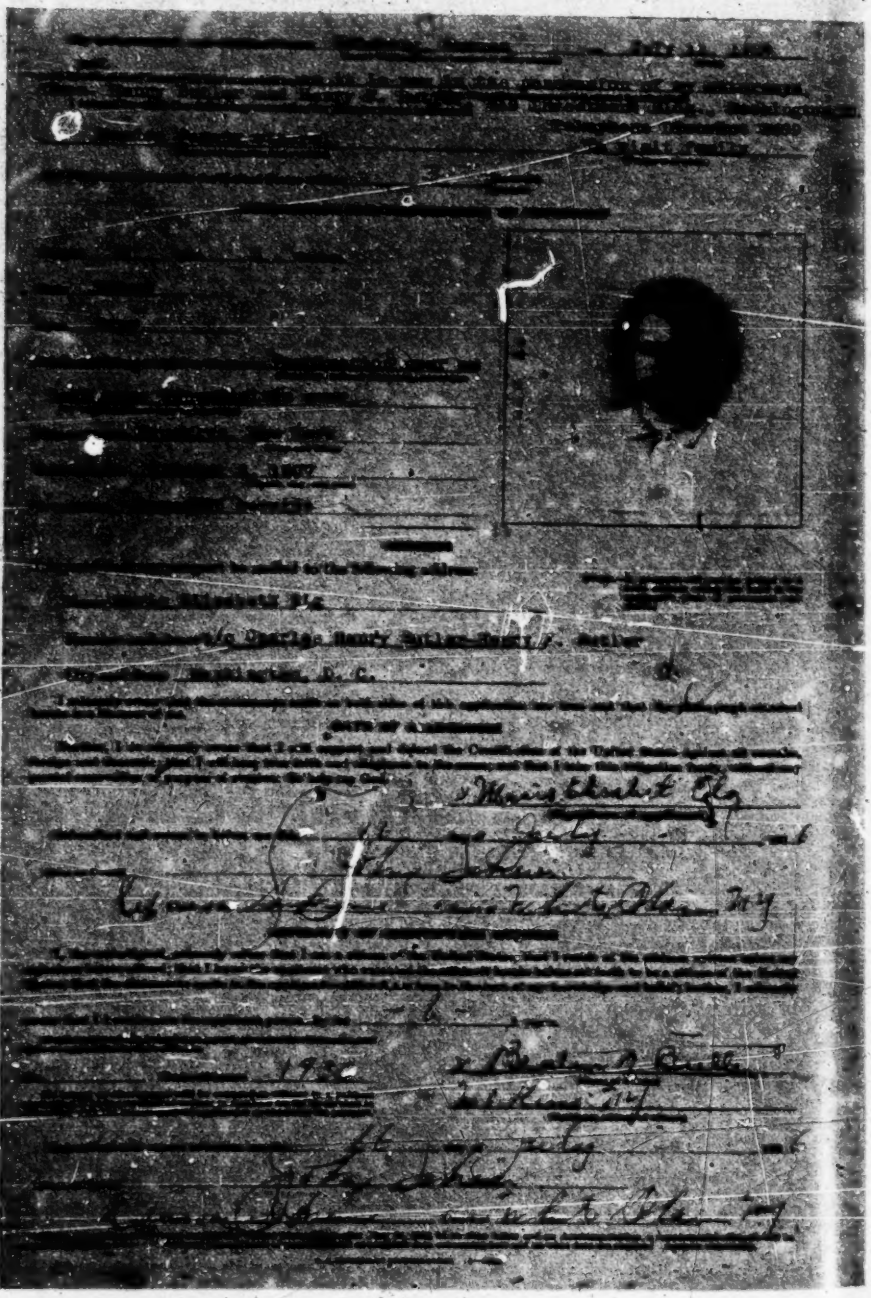


Exhibit F3

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
October 16, 1936.

Address reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894.

Mr. CHARLES HENRY BUTLER,
Attorney at Law, Investment Building, Washington, D. C.

DEAR SIR: In reply to your letter of October 14, 1936, relative to the case of Miss Marie Elizabeth Elg, you are informed that the District Director of this Service, Ellis Island, N. Y. H., is being instructed to take no steps looking to the enforced departure of Miss Elg prior to February 1, 1937.

Respectfully,
By direction of the Commissioner.

W. W. BROWN,
W. W. Brown, *Assistant.*

15 *Exhibit H1*

Address official communications to The Secretary of State Washington, D. C. (Seal of the United States.) In reply refer to 130–Elg, Marie Elisabeth.

DEPARTMENT OF STATE,
Washington, July 29, 1936.

MISS MARIE ELISABETH ELG,
Care of Mrs. Charles Henry Butler,
Investment Building, Washington, D. C.

MY DEAR MISS ELG: The Department has received the application for a passport which was executed by you before the Deputy Clerk of the Supreme Court at White Plains, New York, on July 16, 1936. It appears from that application and from the files of the Department that you were born in Brooklyn, New York, on October 2, 1907; that your father, Gustav Elg, who was born in Sweden, was naturalized as a citizen of the United States before the District Court of the United States at Brooklyn, New York, on September 24, 1906; that in 1911 your mother returned to Sweden taking you with her; that you remained in Sweden until September of 1929, and that your father returned to Sweden in July of 1922, where he has since continued to reside.

Your attention is invited to the first paragraph of Article V of the Swedish Nationality Law of October 1, 1894, as amended by the laws of April 27, 1906, and May 7, 1909, which reads as follows:

"Swedish citizenship is forfeited by anyone who becomes a citizen of another country."

In view of this provision of law your father, of course, ceased to be a Swedish citizen when he was naturalized in the United States on the date above mentioned, and consequently you did not acquire Swedish nationality at birth. Attention is also called to the second paragraph of Article VIII of the same law, which provides as follows:

"If the King has entered into a convention with a foreign Government, that any person previously of Swedish nationality having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time."

Article III of the Protocol to the Convention between the United States and Sweden and Norway concerning naturalization, signed May 26, 1869, provides as follows:

"It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

"The intent not to return to America may be held to exist when the person so naturalized resided more than two years in Sweden or Norway."

16 Obviously in view of the residence of your father in Sweden since July of 1922 without the intention of returning to the United States, the Department is required to hold that under the Article of the Protocol just mentioned he must be considered as having renounced his American citizenship, and his reacquisition of Swedish nationality under the provisions of the second paragraph of Article VIII above quoted of the Swedish law coincidently with his renunciation of American citizenship must be recognized under the Convention above referred to. As to your status, the third paragraph of Article VIII of the Swedish law above referred to provides that:

"If * * * Swedish right or citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless * * * they neither are domiciled in this country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him."

Obviously, under this provision of Swedish law you acquired Swedish nationality coincidently with your father since you were then residing with him, and such acquisition must be recognized as having resulted in the loss of American citizenship under the provisions of the Naturalization Convention in effect between the United States and Sweden.

It may be added that, even in the absence of a convention concerning naturalization with Sweden, the Department would necessarily be obliged in the circumstances of your case to hold that under the provisions of the first paragraph of Section 2 of the Act of March 2, 1907, you lost your American citizenship by being naturalized in a foreign state in conformity with its laws. For your convenience this paragraph of law is quoted:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

In view of the foregoing, the Department is obliged to say that, as you cannot be considered to be a national of the United States, a passport cannot be issued to you.

It may be added that some time subsequent to the issue of a passport to you on July 22, 1929, by the American Consul at Göteborg, Sweden, the Department of Labor communicated with this Department with regard to the preliminary form for declaration of intention to become a citizen of the United States filed by you, called attention to the fact that your father last returned to Sweden in July of 1922, where he had since remained, and requested that the appropriate consular office in Sweden ascertain whether your father had resumed Swedish nationality, and if so, the date of such resumption. On August 20, 1934, this Department communicated with the American Consul at Göteborg transmitting a copy of the letter of August 23, 1934, from the Department of Labor. With a despatch of November 17, 1934, from the consular office mentioned he transmitted an English translation of a communication of October 30, 1934, from the Swedish Ministry for Foreign Affairs to the American Legation at Stockholm, in which it

was held that your father recovered Swedish nationality by
17 resuming his residence in Sweden and remaining there for a
period of two years, and that if you were residing with him at the time you also acquired Swedish nationality under Swedish law. The Consul submitted a report of your father's expatriation in which the names of four of his children, including you, were mentioned as having acquired Swedish nationality with consequent loss of American nationality. The Consul also submitted a statement made by your father on November 13, 1934, reading as follows:

"I, Gustav Elg, now a resident of Grebbestad, Sweden, do hereby solemnly declare:

"That I have voluntarily expatriated myself for the reason that I did not desire to retain the status of an American citizen;

"That my permanent residence in the United States has been voluntarily abandoned and that I neither intend nor desire to resume permanent residence in the United States;

"That I have voluntarily surrendered my Certificate of Naturalization;

"And that I neither intend nor desire to preserve my allegiance to the United States, but intend and desire to preserve my allegiance to Sweden.

In the light of the information obtained from the Swedish authorities, the Department regrets to say that the passport issued to you on July 22, 1929, was issued in error. A copy of the Consul's despatch of November 17, 1934, and the enclosures thereto were forwarded to the Department of Labor on December 13, 1934.

Your attorney, Charles Henry Butler, has inquired whether this Department has advised the Department of Labor that your entry into the United States was illegal. In connection with such inquiry you are advised that supervision over the entry of aliens into the United States is a matter coming entirely within the scope of the duties of the Department of Labor and it is contrary to the usual practice of this Department to express an opinion whether an individual may be considered to have entered the United States illegally.

As of interest to you in connection with your case attention may be invited to the Opinion of the Attorney General of the United States in the case of Ingrid Therese Tobiassen (36 Op. Atty. Gen. 535) and to the decision of October 15, 1934, of the United States Circuit Court of Appeals for the Ninth Circuit in the case of the United States v. Reid (73 F. (2d) 153), both of which relate to the citizenship status of a minor American-born child whose father acquired the citizenship of a foreign country, which act also conferred upon his child then residing with him the citizenship of the same foreign country.

A check for the sum of $9.00, the amount which accompanied your application under acknowledgement, is enclosed.

Sincerely yours,

R. B. SHIPLEY,
R. B. Shipley,
Chief, Passport Division.

Enclosures: Check for $9.00; Copy of this letter.

18 *Exhibit H2*

DEPARTMENT OF STATE,
Washington, September 25, 1936.

Address Official Communications to The Secretary of State, Washington, D. C. (Seal of the United States.) In reply refer to 130-Elg, Marie Elisabeth.

MY DEAR MR. BUTLER: I have received your letter of September 18, 1936, referring to quotations from a statement made by Gustav Elg on November 13, 1934, in regard to his having voluntarily expatriated himself, contained in my letter of July 29, 1936, addressed to Marie Elisabeth Elg. You request that you be furnished with a

copy of the report of the American Consul at Goteborg and advised whether the naturalization certificate of Gustav Elg was surrendered at the time he made the above referred to statement concerning his voluntary expatriation. You also request, if it is permissible, that you be furnished with a copy of the Department's instruction under which the Consul acted in obtaining the declaration from Gustav Elg on November 13, 1934.

On August 23, 1934, the Department of Labor communicated with this Department with regard to the preliminary form for declaration of intention to become a citizen of the United States which was filed by Marie Elisabeth Elg. In its letter the Department of Labor asked that it be ascertained from the appropriate consular officer in Sweden whether Marie Elisabeth Elg's father, Gustav Elg, had resumed Swedish allegiance, and if so, the date of such resumption. Pursuant to this request the Department on August 30, 1934, communicated with the American Consul at Göteborg, transmitting a copy of the letter from the Department of Labor, and requested that he make an appropriate investigation in Miss Elg's case with a view to ascertaining whether her father reacquired Swedish nationality under the Swedish Law of October 1, 1894, upon his return to Sweden, and if so, whether his daughter, Marie Elisabeth Elg, who was born in the United States on October 2, 1907, and resided in Sweden with her father from 1922 to 1929, acquired Swedish nationality through her father's reacquisition of such nationality. The Consul was further instructed that if he should find that Gustav Elg and Marie Elisabeth Elg were naturalized in Sweden and consequently lost their American citizenship under the first paragraph of Section 2 of the Act of March 2, 1907, he should prepare and forward to the Department a report of expatriation.

It is contrary to the long standing policy of the Department to furnish individuals with copies of instructions to its diplomatic and consular officer concerning individuals. However, the instruction concerning Gustav Elg and Marie Elisabeth Elg is substantially as stated.

As was indicated by my letter to Miss Elg of July 29, 1936, the Consul on November 17, 1934, transmitted a report of Mr. Elg's expatriation in which the names of four of his children were mentioned as having acquired Swedish nationality with consequent loss of American nationality. A photostat of the report of expatriation is enclosed.

The files of the Department do not show when Gustav Elg surrendered the certificate of his naturalization. It would seem,
19 however, from the context of the statement of his voluntary expatriation, which was made by Mr. Elg on November 13, 1934, that the certificate of naturalization was forwarded to the Consul at the same time as was the statement.

A bill covering the cost of the photostat is enclosed. Payment may be made in currency or by a postal money order made payable to the Secretary of State, Washington, D. C.

Sincerely yours,

R. B. SHIPLEY,
R. B. Shipley,
Chief, Passport Division.

Enclosures: Photostat, bill.

Exhibit H3

REPORT OF EXPATRIATION OF GUSTAV EDWIN ELG

I, Robert Harnden, Consul of the United States of America at Göteborg, Sweden, hereby certify that Gustav Edwin Elg, who was born at Grebbestad, Sweden, on December 21, 1879, and who was naturalized as a citizen of the United States before the District Court of the United States for the Eastern District of New York at Brooklyn, New York, on September 24, 1906, has expatriated himself by resuming Swedish citizenship. The evidence of such action consists of the following:

Under Articles I and III, and Article III of the Protocol of the Naturalization Treaty between the United States and Sweden and Norway of May 26, 1869, a Swedish born naturalized American citizen may automatically resume Swedish citizenship after two years residence in Sweden. Mr. Elg arrived in Sweden on July 25, 1922, establishing a permanent residence in this country. Accordingly he resumed Swedish citizenship automatically on July 25, 1924, simultaneously losing his American citizenship under the provisions of the first paragraph of Section 2 of the Act of March 2, 1907.

Mr. Elg departed from the United States, where his last residence was in Brooklyn, N. Y., on July 15, 1922.

His wife, Evelyn Sofia Elg, born in Grebbestad, Sweden, on November 24, 1881, derived American citizenship through her marriage, and is now also a Swedish subject.

Children:

Marie Elizabeth, born in Brooklyn, N. Y., on October 2, 1907.
Helen Viola, born in Brooklyn, N. Y., on August 4, 1909.
Gustav Arnhold, born in Grebbestad, Sweden, on May 18, 1912.
Ruth Ingeborg, born in Grebbestad, Sweden, on March 27, 1915.

The address of Marie Elizabeth is 891 Park Ave., New York; Helen Viola is at present visiting in Grebbestad, Sweden, provided with permit to reenter the U. S.; the two youngest children are residing with their parents in Grebbestad, Sweden.

Since all the children were residing with their father in Sweden at the time he regained Swedish nationality, they acquired Swedish nationality at the same time, under the provisions of Article 8,

20 Par. 3, of the Swedish law of October 1, 1894, simultaneously losing their American citizenship under the provisions of the Act of March 2, 1907, above referred to.

The address of Mr. Elg is Grebbestad, Sweden.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal, this 17th day of November 1934.

[OFFICIAL SEAL]

ROBERT HARNDEN,
Robert Harnden,
Consul of the United States of America,
at Göteborg, Sweden.

KHL.

Exhibit H4

DEPARTMENT OF STATE,
Washington, September 26, 1936.

Address official communications to The Secretary of State, Washington, D. C. (Seal of the United States).

MY DEAR MR. BUTLER: In reply to your letter of September 25, I must say that I do not agree with you in your conclusion concerning Gustav Elg. In fact, it does not appear that paragraph 2 of Section 2 of the Act of March 2, 1907, has anything to do with the case of Gustav Elg or his daughter.

Sincerely yours,

R. B. SHIPLEY,
Ruth Shipley,
Chief, Passport Division.

MR. CHARLES HENRY BUTLER,
Investment Building, 15th and K Streets, Washington, D. C.

IN United States District Court

Rule to show cause

Filed January 14, 1937

* * * * * * * *

On reading and filing the annexed complaint and on motion of Henry F. Butler, attorney for plaintiff, it is

Ordered that the defendants and each of them show cause before this Court on January 26th, 1937, at ten o'clock in the forenoon of that day why an injunction as prayed for in the complaint during the pendency of this action should not be granted and let service of this order on the defendants on or before January 16th, 1937, be sufficient service thereof.

F. DICKINSON LETTS,
Justice, District Court of the United States
for the District of Columbia.

Marshal's return

Served a copy of the within above rule on within named defendants, Frances Perkins, By G. B. Reilly, Asst. Sol., Edward J. Shaughnessy, Acting Com., etc. Cordell Hull, By H. G. Hackworth, Sol., Personally, January 14, 1937.

JOHN B. COLPOYS,
U. S. Marshall in and for the Dist. of Columbia.
By HARRY C. AILEN,
Deputy U. S. Marshal.

In United States District Court

Return to rule to show cause

Filed January 25, 1937

* * * * * * *

Come now the above-named defendants in the above-entitled cause and for return to the rule to show cause issued therein, and expressly reserving the right to answer, move to dismiss, or otherwise plead to the bill of complaint filed herein, say:

1. That in respect to the defendant Cordell Hull no temporary injunctive relief is prayed and no purported grounds therefor are stated in the bill of complaint.

2. That in respect to the defendants Perkins and Shaughnessy no grounds for temporary injunctive relief are stated in said bill of complaint in that the only purported threat of deportation set forth is that contained in Exhibit F-3 attached to the bill of complaint in which the Commissioner notified plaintiff's counsel that the District Director of the Immigration Service at Ellis Island was being instructed to take no steps looking to the enforced deportation of plaintiff prior to February 1, 1937, there being no allegation that affirmative steps will be taken after February 1, 1937.

3. That in respect to the defendants Perkins and Shaughnessy, said defendants have no intention to enforce deportation proceedings pending the outcome of this case in this court.

4. That plaintiff's bill of complaint is multifarious and constitutes a misjoinder of causes of action in that the relief sought against defendant Cordell Hull relates to his refusal to issue a passport whereas the relief sought against the defendants Perkins and Shaughnessy relates to an anticipated deportation proceeding, the defenses to which are separate, and it is inconvenient to dispose of said causes together.

5. The plaintiff's bill of complaint is further multifarious and constitutes a misjoinder of causes of action in that he seeks a declara

tory judgment as well as an injunction, the rule permitting the joinder of a suit for a declaratory judgment with a principal cause of action being confined to an action at law, and plaintiff's action being an action in equity.

6. The bill of complaint shows on its face that as far as defendants Perkins and Shaughnessy are concerned, plaintiff has a plain, adequate, and complete remedy at law; namely, by habeas corpus if and when deportation proceedings are instituted.

7. The bill of complaint shows on its face that in respect to the defendant Cordell Hull this court will give no relief as prayed
22 for against him because the relief sought involves the exercise of judgment and discretion by said defendant.

For the foregoing reasons defendants pray that the rule to show cause issued herein be discharged and that the application for a temporary injunction be denied as to each and all of the defendants.

FRANCES PERKINS,
Secretary of Labor.
EDWARD J. SHAUGHNESSY,
Acting Commissioner of Immigration and Naturalization.
CORDELL HULL,
Secretary of State.

DISTRICT OF COLUMBIA, *ss:*

I, Edward J. Shaughnessy, being first duly sworn, declare and say that I have read the foregoing return to the rule to show cause issued in the above-entitled cause, and verily believe the facts stated therein to be true.

EDWARD J. SHAUGHNESSY,
Acting Commissioner of Immigration and Naturalization.

Subscribed and sworn to before me this 23d day of January, 1937.

[NOTARIAL SEAL] J. C. WATTS, *Notary Public.*

LESLIE C. GARNETT,
United States Attorney.
DAVID A. PINE,
Assistant United States Attorney,
Attorney for Defendants.

ALBERT E. REITZEL,
Assistant Solicitor of Labor.
R. W. FLOURNOY,
Solicitor to Legal Advisor, Department of State,
Of Counsel.

Received copy of the foregoing return to rule to show cause this 25th day of January 1937.

HENRY F. BUTLER,
Atty. for plaintiff.

In United States District Court

Order to discharge rule to show cause.

Filed January 26, 1937

* * * * * * *

The above entitled cause having come on to be heard and all parties being represented in court by their attorneys, upon statement by attorney for the defendants and as set forth in Paragraph 8 of the defendants' return to rule to show cause, that the defendants, Perkins and Shaughnessy, have no intention to enforce deportation proceedings pending the ontcome of this case in this court, it is—

Ordered that the rule to show cause is hereby discharged this 26th day of January 1937, but without prejudice to any other rights of the parties.

F. Dickinson Letts,
Justice District Court of the United States for the District of Columbia.

23 In United States District Court

Motion to dismiss bill of complaint

Filed February 4, 1937

* * * * * * *

Come now the above named defendants, and each of them, by their attorneys below named, and move to dismiss the bill of complaint filed in the above entitled cause, on the following grounds:

1. Plaintiff's bill of compluint is multifarious and constitutes a misjoinder of causes of action in that the relief sought against defendant Cordell Hull relates to his refusal to issue a passport and to the alleged making of statements by said defendant to public officials and others to the effect that plaintiff is not a citizen of the United States, whereas the relief sought against the defendants Perkins and Shaughnessy relates to an alleged anticipated deportation proceeding against plaintiff; the defenses to which said causes of action are separate and sufficient grounds do not appear for uniting the same in order to promote the convenient administration of justice.

2. The plaintiff's bill of complaint further constitutes a misjoinder of causes of action in that she seeks a declaratory judgment as well as an injunction, the rule permitting a joinder of an application for a declaratory judgment with a principal cause of action being confined to an action at law and the plaintiff's action being an action in equity.

8. The bill of complaint discloses on its face that so far as defendants Perkins and Shaughnessy are concerned plaintiff has a plain, adequate, and complete remedy at law; namely, by habeas corpus if and when deportation proceedings are instituted.

4. The bill of complaint shows on its face that in respect of the defendant Cordell Hull, this court is not empowered to give the relief prayed for against him because the relief sought involves the exercise of judgment and discretion by said defendant Cordell Hull in matters committed to his care as Secretary of State, in that the bill of complaint seeks to enjoin him from refusing to issue plaintiff a passport and from making statements to public officials and others that plaintiff is not a citizen of the United States.

5. The bill of complaint shows on its face that in respect of the defendants Perkins and Shaughnessy there is no actual controversy within the meaning of the Declaratory Judgments Law or within the meaning of Clause 1, Section 2, Article III of the Constitution.

6. The bill of complaint shows on its face that in respect of the defendants Perkins and Shaughnessy, if there is an actual controversy within the meaning of said law and said clause of the Constitution, it is not one in which this court will grant a declaratory judgment, inasmuch as this is forbidden by statutory and substantive law, and this is not a case within this court's jurisdiction.

7. The bill of complaint shows on its face that in respect of the defendant Cordell Hull, while there may be an actual controversy within the meaning of said law and said clause of the Constitution in the refusal by defendant Cordell Hull to issue a passport, it is not one in which the courts will grant a declaratory judgment, in-
24 asmuch as the substantive law forbids interference by the judiciary in matters involving the exercise of judgment and discretion by the executive branch of the Government, and the said Declaratory Judgments Law in the instance is coterminus in its scope with the remedy provided by injunction or mandamus.

8. The bill of complaint shows on its face that in respect of defendant Cordell Hull, there is no actual controversy within the meaning of said Declaratory Judgments Law or said clause of the Constitution in relation to the making of statements by said defendant in the course of his official duties in respect of plaintiff's citizenship, but only a difference of opinion between the plaintiff and defendant Cordell Hull.

9. The plaintiff is not a citizen of the United States by virtue of Article III of the Protocol to the Convention between the United States and Sweden and Norway, proclaimed January 12, 1872 (17 Stat. 809–810), and by virtue of Paragraph 1 of Article V, and Article VIII of the Swedish Nationality Law of October 1, 1894, as amended by the laws of April 27, 1906, and May 7, 1909, set forth in Exhibit

H-1 to the plaintiff's bill of complaint, and by virtue of Section 2 of the Act of March 2, 1907, Title 8, U. S. C., Sec. 17.

And for other reasons apparent of record.

LESLIE C. GARNETT,
United States Attorney.

DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Defendants.

BART W. BUTLER,
Attorney, Department of Justice.
ALBERT E. REITZEL,
Assistant Solicitor of Labor.
R. W. FLOURNOY,
Assistant to Legal Adviser, Department of State,
Of counsel.

In United States District Court

Stipulation with respect to the laws of Norway

Filed June 12, 1937

* * * * * * * * *

It is hereby stipulated by and between the parties hereto, by their attorneys, that upon the hearing of this motion, whether the same be on motion to dismiss or upon final hearing, the court may take judicial notice of the statutes of Norway; accepting as correct translations without further proof the English translations as they appear in U. S. House Documents, Volume 72, No. 326, 59th Congress, Second Session, 1907, and in Nationality Laws, Flournoy and Hudson, and in any regularly printed compilation of said laws or portions of them intended for use by Norwegian Legations or Consulates; and either party may refer to such statutes in oral or written arguments without making proof thereof. Each party reserves the right in the
25 event of a final hearing of the cause on evidence, to produce expert witnesses to prove such foreign laws if he shall be so advised.

LESLIE C. GARNETT,
United States Attorney.
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Defendants.
HARRY F. BUTLER,
Attorney for Plaintiff.

In United States District Court

Stipulation with respect to the laws of Sweden

Filed June 12, 1937

* * * * * * *

It is hereby stipulated by and between the parties hereto, by their attorneys, that upon the hearing of this cause, whether the same be on motion to dismiss or upon final hearing, the court may take judicial notice of the statutes of Sweden as the same appear in the English translation in two certain books entitled "Consular Statute Book of Sweden" dated 1910, and "Statute Book for Legations and Consulates" dated 1931, and either party may refer to such statutes in oral or written arguments without making proof thereof. Each party reserves the right in the event of a final hearing of the cause on evidence, to produce expert witnesses to prove such foreign laws if he shall be so advised.

LESLIE C. GARNETT,
United States Attorney.
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Defendants.
HENRY F. BUTLER,
Attorney for Plaintiff.

In United States District Court

Opinion of Mr. Justice Bailey

Filed November 1, 1937

* * * * * * *

The motion to dismiss will be sustained as to the defendant, Hull, for the reason that the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue.

According to the allegations of the bill, the Department of Labor has notified the plaintiff that she is illegally within the United States and has required her to leave the United States, and in case of her not doing, she would be deported as an alien. Her only resource would be to submit to arrest and then seek the issuance of a writ of habeas corpus. I think that this belongs to a class of cases for
26 which a declaratory judgment is eminently suited. It is immaterial whether the Court could enjoin the action of the Department of Labor "where there is such a concrete case admitting

of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages." Aetna Life Ins. Co. v. Haworth, U. S. Sup. Ct. (March 1, 1937).

The bill alleges that she was born in the United States, was taken during her minority by her parents to Sweden. Within a year after her attaining her majority and without having renounced her allegiance to this country, she came to this country. I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native-born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it.

The motion to dismiss will therefore be sustained as to the defendant, Hull; in other respects overruled.

BAILEY, *J.*

In United States District Court

Final decree

Filed November 18, 1937

* * * * * * *

This cause came on to be heard at this term; and, thereupon, upon consideration thereof, it is by the Court this 18th day of November, 1937,

Adjudged, ordered, and decreed that the motion to dismiss filed herein be, and the same hereby is, sustained as to defendant Cordell Hull, Secretary of State, and, the plaintiff electing not to amend, the bill of complaint, filed herein be, and the same hereby is, dismissed as to defendant Cordell Hull; and it is further

Adjudged, ordered, and decreed that the motion to dismiss filed herein be, and the same hereby is, overruled as to defendants Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization; and, said defendants Perkins and Shaughnessy electing to stand upon their motion to dismiss as filed herein, that the said plaintiff Marie Elizabeth Elg be, and she hereby is, declared to be a natural born citizen of the United States.

JENNINGS BAILEY, *Justice.*

OK as to form:

HENRY F. BUTLER,
Atty. for Plaintiff.

DAVID A. PIKE,
Asst. U. S. Atty., Atty. for Defendants.

From the foregoing decree sustaining the motion to dismiss of defendant Cordell Hull, Secretary of State, and dismissing the bill of

complaint as to said defendant Cordell Hull, Secretary of
27 State, the plaintiff, by her attorney in open court, notes an appeal to the United States Court of Appeals for the District of Columbia; whereupon, the undertaking for costs is fixed in the sum of $100.00 with leave to deposit the sum of $50.00 with the clerk in lieu thereof.

From the foregoing decree overruling the motion to dismiss of defendants Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and declaring the plaintiff Marie Elizabeth Elg to be a citizen of the United States, said defendants Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, by their attorneys in open court, note an appeal to the United States Court of Appeals for the District of Columbia.

November 18th, 1937.

JENNINGS BAILEY, *Justice.*

In United States District Court

Assignment of errors

Filed December 2, 1937

* * * * * * *

The Court erred—

1. In overruling the motion to dismiss as to defendants Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization.

2. In entering a declaratory decree that the plaintiff Marie Elizabeth Elg is a natural-born citizen of the United States.

3. In refusing to sustain the motion to dismiss as to said defendants Perkins and Shaughnessy.

4. In not dismissing the bill of complaint as to defendants Perkins and Shaughnessy.

5. In not holding that plaintiff's bill of complaint was multifarious and constituted a misjoinder of causes of action.

6. In not holding that plaintiff has a plain, adequate and complete remedy at law as to defendants Perkins and Shaughnessy.

7. In holding that the Declaratory Judgments Law could be invoked in this case.

8. In not holding that there was no actual controversy within the meaning of the Declaratory Judgments Law or within the meaning of Clause 1, Section 2, Article III of the Constitution as to defendants Perkins and Shaughnessy.

9. In holding that the District Court of the United States for the District of Columbia had jurisdiction to enter a declaratory decree as to plaintiff's citizenship.

10. In refusing to hold that this is not a case within the jurisdiction of the District Court of the United States for the District of Columbia.

11. In refusing to hold that plaintiff is not a citizen of the United States by virtue of Article III of the Protocol to the Convention between the United States and Norway and Sweden proclaimed January 12, 1872, and by virtue of the Swedish Nationality Law of 1894 as amended, and by virtue of Section 2 of the Act of March 2, 1907, Title 8 U. S. C., Section 17.

28 12. In holding that plaintiff is a natural born citizen of the United States under facts stated in Bill of Complaint.

13. In other respects apparent of record.

LESLIE C. GARNETT,
United States Attorney,
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Perkins and Shaughnessy.

Service of the foregoing Assignment of Errors acknowledged this 2 day of Dec. 1937.

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg.

Memorandum December 3, 1937. Bond ($100) on appeal of Henry F. Butler approved and filed.

In United States District Court

Plaintiff's assignment of errors

Filed December 3, 1937

* * * * * * *

The Court erred—

1. In sustaining the motion to dismiss as to defendant Cordell Hull, Secretary of State.

2. In dismissing the bill of complaint as to defendant Cordell Hull.

3. In other respects apparent of record.

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg.

Service of the foregoing Assignment of Errors acknowledged this 2nd day of December 1937.

LESLIE C. GARNETT,
DAVID A. PINE,
Attorneys for Defendants.

In United States District Court

Docket entries

* * * * * *

1937

Jan. 14—Bill, appearance, order to file & exhibits (8) filed.
" "—Rule returnable Jan. 26/37. Ret. served all. Letts, J.
" "—Spa. to ans. & copies (3) issued. Ret. Served.
" 25—Return to rule to show cause—App. U. S. Atty.
" 26—Order discharging rule without prejudice. Letts, J.
Feb. 4—P. & A. of plff. in opp. to mo. to dismiss.
" "—Mo. of defts. to dismiss bill—App. Butler.
June 12—Stipulations (2).
" "—Reply to motion to dismiss.
Oct. 25—Motion to dismiss Bill argued & submitted. (Bailey, J.).
Nov. 1—Filed memorandum opinion of Court sustaining motion to dismiss as to Deft. Hull and overruling in other respects; order to be entered. (Bailey, J.).
" Nov. 18—Final decree sustained motion to dismiss as to deft Cordell Hull; overruling as to defts (1) & (2); appeal of plff; undertaking $100 or $50; appeal of defts. (Bailey, J.)
Dec. 3—Designation of Record.
" "—Assignment of Errors.
" "—Bond ($100) on appeal of Henry F. Butler with Glens Fall Indemnity Co., surety, app'd & filed.
" "—Plff's Assignment of Errors Filed.

In United States District Court

Designation of record

Filed December 2, 1937

* * * * * *

Now come Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and designate the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal, namely:

1. Bill of complaint with exhibits.
2. Order to show cause why an injunction pendente lite should not be granted.
3. Return to rule to show cause why an injunction should not be granted.
4. Order discharging rule to show cause.
5. Stipulation with respect to the laws of Norway.

6. Stipulation with respect to the laws of Sweden.
7. Motion to dismiss bill of complaint.
8. Opinion of Mr. Justice Bailey filed November 1, 1937.
9. Final decree, with notation of appeals.
10. Docket Entries.
11. This designation.
12. Assignment of Errors.

LESLIE C. GARNETT,
United States Attorney,
DAVID A. PINE,
Assistant United States Attorney,
Attorneys for Perkins and Shaughnessy.

Service of the foregoing Designation of Record acknowledged this — day of Dec. 1937.

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg.

[Clerk's certificate to foregoing transcript omitted in printing.]

31 In United States Court of Appeals for the District of Columbia

[Titles omitted.]

Minute entry of argument

June 14, 1938

The argument in the above entitled causes was commenced by Mr. Henry F. Butler, attorney for Marie Elizabeth Elg, and was continued by Mr. David A. Pine, attorney for Frances Perkins, Secretary of Labor; Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization; and Cordell Hull, Secretary of State, and was concluded by Mr. Henry F. Butler, attorney for Marie Elizabeth Elg.

* * * * * * *

32 In United States Court of Appeals for the District of Columbia

Nos. 7096 and 7097

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, APPELLANTS

v.

MARIE ELIZABETH E. G, APPELLEE

MARIE ELIZABETH ELG, APPELLANT

v.

FRANCES PERKINS, SECRETARY OF LABOR; EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION; AND CORDELL HULL, SECRETARY OF STATE, APPELLEES

Appeal and Cross-Appeal from the District Court of the United States for the District of Columbia

Argued June 14, 1938—Decided August 1, 1938

David A. Pine, United States Attorney, and John H. Mitchell, Assistant United States Attorney, both of Washington, D. C., for appellants in No. 7096 and appellees in No. 7097.

Henry F. Butler, of Washington, D. C., for appellee in No. 7096 and appellant in No. 7097.

Before GRONER, C. J., and MILLER and VINSON, JJ.

Opinion

GRONER, C. J.: The main question in this case is whether appellee, a natural born citizen of the United States, has lost her citizenship involuntarily and by operation of law, by reason of her removal from the United States by her parents in her infancy and her residence in a foreign country until she was 21 years of age.

A secondary question is whether the suit is properly brought under the Declaratory Judgment Act (28 U. S. C. A. 400).

The facts are these: Marie Elizabeth Elg was born October 2, 1907, in the city and state of New York, and at the time of bringing this suit was and now is a resident of Mt. Kisco, Westchester County, New York. Some years prior to her birth her parents emigrated from Sweden to the United States, and in September 1906, her father was naturalized in New York. In 1911, when four years of age, Miss Elg was taken by her mother to Sweden, where she resided until she was 21 years of age. Her father remained in the United States until 1922, at which time he too returned to Sweden, where he has lived ever since. Shortly before she attained her
33 majority Miss Elg inquired of an American consul in Sweden what steps she shoud take when she reached legal age to return to the United States as an American citizen. As the result of this inquiry the Secretary of State of the United States issued instructions to the consul at Göteborg in Sweden to furnish Miss Elg an American citizen's passport, and in 1929 when 21 years of age, Miss Elg returned to the United States and was admitted at the port of New York as a natural born citizen of the United States. In April 1934—because investigation of her father's status by American consular officials developed the fact that he had no intention of returning to the United States and was willing to surrender his naturalization certificate—Miss Elg was examined by the immigration service in New York; and in April 1935 she was notified that she was an alien illegally in the United States, and was ordered to leave the country and threatened with deportation if she did not. As the result of her protest, the Secretary of Labor and the Commissioner of Immigration, as a matter of grace, suspended action temporarily,

but all the while insisting upon the validity of the holding that she was an alien illegally in the United States and all the while threatening to have her deported. In July 1936 Miss Elg applied to the Secretary of State for an American passport, which the Secretary refused on the ground that, because of the residence of her father in Sweden since 1922 without the intention of returning to the United States, the Department considered that he had renounced his American citizenship and reacquired Swedish nationality, and that because of her residence with her father she too had lost the one and acquired the other.

In January 1937 Miss Elg brought her suit in the United States District Court in the District of Columbia against the Secretary of Labor, the Commissioner of Immigration, and the Secretary of State. She prayed for a judgment declaring that she is a natural born citizen of the United States and entitled to all the rights and privileges of a citizen; and she prayed further that the Secretary of Labor and the Commissioner of Immigration be enjoined from carrying out the threat to deport her from the United States or from interfering with her residence therein; that the Secretary of State be enjoined from officially holding her not to be a citizen of the United States and refusing to issue her a passport; and for general relief. A show cause order was issued, and the case was heard on the return thereto and on a motion to dismiss the bill. The court held that plaintiff had not lost her American citizenship by her residence abroad during her minority; that when she elected to return and did return to the United States immediately after her emancipation she was entitled to be treated as a citizen of the United States; and that the deportation proceedings begun against her and suspended only by her suit, presented an actual controversy entitling her to a declaratory judgment. The court dismissed the bill as to the Secretary of State on the ground that the issuance of a passport involved discretion, but refused to dismiss as to the Secretary of Labor and the Commissioner of Immigration. All parties elected to stand on their pleadings, and the present cross appeals were duly effected.

We think the decision of the lower court is in all respects correct.

The law of England, as of the time of the Declaration of Independence, was that a person born in that kingdom owed to
34 the sovereign allegiance which could not be renounced. Many early American decisions applied that as the common law in this country. All agreed that every free person born within the limits and the allegiance of a State of the United States was a natural born citizen of the State and of the United States. And this was undoubtedly the view of Mr. Justice Curtis in his dissenting opinion in the Dred Scott case (19 How. 393, 581), in which he said:

"* * * we find that the Constitution has recognized the general principle of public law, that allegiance and citizenship depend upon the place of birth."

This doctrine of citizenship by reason of place of birth is spoken of by the writers on the subject as the jus soli or common law doctrine. The Roman rule is different and is in effect in many of the continental European countries. This is called the jus sanguinis and depends upon the nationality of the parents and not upon the place of birth. Professor Bluntschild, in speaking of the latter doctrine, said:

"The bond of the family lies at the foundation of national and political life, and attaches the child to the people among whom he is born. The opinion that fixes upon the locality of nativity, instead of the personal tie of the family, as the cause of nationality, abases the person to be a dependence of the soil."[1]

But this was not the common law.[2] United States v. Wong Kim Ark, 169 U. S. 649. When the Constitution was adopted the people of the United States were the citizens of the several States for whom and for whose posterity the government was established. Each of them was a citizen of the United States at the adoption of the Constitution, and all free persons thereafter born within one of the several States became by birth citizens of the State and of the United States.[3]

The first attempt by Congress to define citizenship was in 1866 in the passage of the Civil Rights Act (R. S. 1992). The act provided that:

"All persons born in the United States and not subject to any foreign power are declared to be citizens of the United States."

And this in turn was followed in 1868 by the adoption of the Fourteenth Amendment, declaring:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

As a result of the adoption of the amendment, whatever differences existed between statesmen and jurists on the general subject prior to the War Between the States was put to rest, and it may now be stated as an established rule that every person born within the United States (except in the case of children of ambassadors, etc.), whether born of parents who are themselves citizens of the United States or of foreign parents, is a citizen of the United States. In the Wong Kim Ark case, supra, the whole question of citizenship is traced from its source and the subject is so elaborately considered as to make unnecessary any further reference to this phase of the ques-

[1] Article 2, Rev. de droit Int. & leg. Compale. See also Dr. Arnolds' (or Rugby) Mis. writings, art. Christian policies, p. 465; 1 Gibbon 45—2 Ibid. 158.

[2] Both England and the United States (Act of 25 Ed. III Stat. 2, passed in 1350, and Act of April 14, 1802, R. S. 1993) under some circumstances recognized citizenship on the part of children of subjects or citizens born out of the jurisdiction of the respective countries.

[3] Mr. Calhoun in his published work upon the Constitution denied that there was any citizenship of the United States in any other sense than as being connected with the government through the States.

tion. But see generally on the subject: McCreary v. Somerville, 9 Wheat. 354; Re: Look Tin Sing, 21 F. 905; Ex parte Chin King, 35 F. 354; Gee Fook, 49 F. 146; Lynch v. Clark (N. Y.), 1 Sands Ch. 583; Opinion of Attorney General Black in 1859 (9 Op. 373); of Attorney General Bates in 1862 (10 Op. 394).

And this brings us to the second branch of the question, that is, whether appellee through the act of her parents has lost the rights of citizenship which she acquired at her birth. The question is not new. In circumstances such as these Attorneys General have for nearly a hundred years, and almost unanimously, answered it in the negative; and their views are supported by the decisions of many courts.

In this case it is agreed that appellee has done no act of her own showing an intention to surrender or forfeit her rights as a citizen of the United States. To the contrary, it is recognized that immediately upon her emancipation, she asserted them, and after the recognition of them by the United States returned to this country. If, in spite of this, she has lot those rights, it must be because she became by operation of Swedish law a naturalized citizen of Sweden upon her father's repatriation there, and in consequence ceased, also by operation of law, to be a natural born American citizen.

We think there is a conclusive answer to this proposition.

The Swedish law, it is agreed by both sides, is found in paragraph 3 of Article VIII of the Citizenship Act of Sweden of 1894. The parties, however, differ in the translation of the paragraph. Appellee insists that, rendered in English, it reads as follows:

"If Swedish citizenship is recovered by a * * * father Swedish citizenship shall also accrue to his * * * children who are under age, unless * * * they are not resident in Sweden at the time when the * * * father recovers Swedish citizenship or have not lost along with him citizenship in the foreign country."

As rendered by appellants, it reads:

"If * * * Swedish right of citizenship has been regained by the * * * father, such right also accrues to his * * * children under age, unless * * * they neither are domiciled in this country when citizenship is regained by the * * * father, nor have lost their citizenship in the foreign country together with him."

The parties likewise differ as to the interpretation of the paragraph. Appellee insists it means that two conditions must concur to confer Swedish citizenship on the infant—the infant must be with his father and the law of the country of his birth must have expatriated him upon his father's resumption of Swedish citizenship. Appellants insist that the conditions in the paragraph must be read in the alternative and, so read, must be taken to confer Swedish citizenship on the infant either in the event of his being in Sweden or in the event of his losing his citizenship upon his father's repatriation. Relying upon this latter reading of the paragraph, appellants say that by virtue of the express terms of Section 2 of the Act of

March 2, 1907 (8 U. S. C. A. 17)—which provides that any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws—appellee was at no time after two years from the date of her father's return to Sweden a citizen of the United States. But in the view we take of the main question, it is not necessary to determine the meaning or effect of the Swedish statute. For even granting the interpretation insisted on by appellants, we think the argument based upon it goes too far. If we concede that under Swedish law appellee became a naturalized Swedish citizen during her minority residence in that country, we should have only what is well known in international law as double citizenship, and whatever effect that status might have on appellee's right to call on the United States for protection[4] while she remained abroad, it would not affect her right of election when she reached her majority to claim and resume her American citizenship and return to the United States. Or, stated differently, even if we assume that a naturalized American citizen by abandoning his residence in this country and by returning to the country of his birth animo manendi, ceases to be a citizen of the United States and that his minor child born in the United States partakes during his legal infancy of his father's restored nationality, such child nevertheless, upon becoming sui juris, has the right to elect to retain his American citizenship—and such election, which is best evidenced by a return to the United States, restores his original status as a citizen of the United States. This was the view expressed by Secretary Bayard in a letter to Mr. Liebermann on July 9, 1886,[5] and grows out of the well recognized doctrine that expatriation is a matter of intent on the part of the person concerned, which intent must be shown by some express act or some other act from which it can be gathered.[6]

The record in this case is wholly lacking in any showing of intent, actual or presumptive, on the part of appellee at any time to abandon American citizenship and, lacking such showing, what was said by Attorney General Pierrepont in Steinkauler's Case (15 Op. 15) is true here, that:

"There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States * * *."

Like opinions were expressed by Secretary Olney on May 29, 1896, in a letter to Mr. Materne, by Secretary Frelinghuysen in 1882, and by Mr. Blaine in 1892. These and many other instances of the application of the rule to a state of facts like those in the present case are to be found in Moore's Digest of International Law, Vol. 3, p. 582,

[4] Much confusion has resulted from the failure to distinguish between cases involving the question whether a citizen is entitled to protection abroad and cases involving per se the question of citizenship.
[5] Moore's Digest of International Law, p. 542.
[6] Van Dyne, Citizenship of the U. S. (1904), p. 275.

et sequel. And the rule is summarized in the statement of Mr. Uhl, acting Secretary of State, in a letter to Mr. Rudolph of May 22, 1885, as follows:

"* * * no principle is better settled than that birth in the United States, irrespective of the nationality of the parents, confers American citizenship. The right of election of nationality, which it is generally conceded a person born under such circumstances has, cannot be exercised until he attains his majority. The father cannot by any act of his alter the status conferred upon the son by his birth in this country."

This was also the conclusion of Judge Hough in United States v. Husband, 6 F. 2d 957, where, quoting from Secretary Bayard, he said:

"It has been repeatedly held by us that, when a person born in the United States arrives at 21 in a foreign country, the mode of
37 expressing his election to be a citizen of the United States is by promptly returning to the United States. * * * That is what is called double allegiance, and by the law of nations the nationality of such persons is to be determined by their own election of nationality at their maturity, which election is evidenced by placing themselves in the country they elect."

See also to the same effect, United States v. Com. of Immigration, 28 F. 2d 44; State, ex rel. Phelps v. Jackson, 79 Vt. 504, 65 A. 657. This result necessarily follows from the fundamental rule that a natural born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country. Morse, Citizenship by Birth, etc., p. 230. The change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father. Wong Kim Ark case, p. 691. In the instant case neither the Act of March 2, 1907, nor any other statute has taken away or diminished those rights, and it is doubtful, indeed, if there is any power in Congress—in view of the provisions of the Fourteenth Amendment—to take them away. On this subject the Supreme Court in the Wong Kim Ark case said, p. 703:

"Congress having no power to abridge the rights conferred by the Constitution upon those who have become naturalized citizens by virtue of acts of Congress, a fortiori no act or omission of Congress, as to providing for the naturalization of parents or children of a particular race, can affect citizenship acquired as a birthright, by virtue of the Constitution itself, without any aid of legislation. The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no au-

thority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship."

We are, therefore, of opinion that when in 1929, upon a full disclosure of all the facts set out herein—as the bill declares was the case—the State Department of the United States issued to appellee a passport to return to the United States as an American citizen, it acted properly and in accordance with the law. In our opinion appellee is a natural born American citizen whose right to all the privileges of citizenship—whether or not, as far as concerns diplomatic protection, it be considered as suspended during her minority and sojourn in a foreign country—was in full effect when on her majority she applied for and received her passport. We are, therefore, of opinion that she was properly admitted into this country and, as the lower court held, is entitled now to be free of molestation.

We have carefully examined the opinion of the Attorney General in Tobiassen's case, 36 Op. 535,[1] and the case of United States v. Reid, 73 F. 2d 153[2] (certiorari denied on the sole ground that the petition was not filed in time, 299 U. S. 544), upon which appellants rely; and we think that the arguments they make out are not supported
38 by the statute on which they are mainly built,[3] and likewise that the conclusions reached are opposed to the established rules and principles which, it seems to us, not only should apply but since the adoption of the Constitution have been applied.

And this brings us to the final question in the case, namely, whether the Declaratory Judgment Act is applicable.

The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.

There can be no doubt that the lower court had jurisdiction of the several defendants and that it has jurisdiction of the subject matter of the suit. There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threat-

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[1] The opinion assumes, directly in the teeth of established principles of international law, that the involuntary acquisition of alien citizenship by an American child divests and destroys his native citizenship. In this respect it overlooks the principle of double citizenship (Moore, Vol. 3, p. 518) and the right of election at majority (Moore, p. 541) and also Boyd v. Thayer, 143 U. S. 135, 178, and it is not supported by any language to be found in the Act of 1907, for that statute by its plain terms contemplates the personal abandonment of allegiance effected by personal acts. It is universally recognized that an infant cannot change his domicile, Lamar v. Micou, 112 U. S. 452, 470, for in such a matter he has no will of his own; and, as the basis of expatriation is deliberate intention, that quality is wholly lacking where the act is the result of constraint.

[2] See the opinion of Judge Fee in this same case in the District Court, 6 F. Supp. 800.

[3] 8 U. S. C. A. 17 (presumption statute).

ened her with arrest and deportation. The threat remains unretracted and is in abeyance only by agreement of counsel pending the decision of the case. She has not yet been arrested, and therefore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights—certainly no less valuable than property rights—and an actual and vital controversy exists between her and the government in relation to them. The right to be immune from threats of deportation and from the declarations of public officials that she is an alien and subject to arrest is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit. If she is deported as an alien, her return at all to the United States will be possible only under very difficult conditions. And if the Secretary and Commissioner decide for purposes of their own to postpone her deportation indefinitely, she would, as a publicly declared alien, be subject to entirely different conditions of residence in the United States and to curtailment of the rights and privileges which she might enjoy as a citizen of the United States, such as traveling about freely, demanding and receiving protection from her government, voting, serving as a juror, and holding public office.

We think the facts we have outlined present a case fairly within the intent and purpose of the act whereby appellee may test the validity of the threat and have, as she is entitled to have, a declaratory judgment of her American citizenship. For we certainly have a case "admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged," and in these circumstances the Supreme Court has said the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Aetna Life Ins. Co. v. Haworth, 300 U. S. 227.

The decree of the District Court declaring appellee to be a natural born citizen of the United States is in all respects affirmed.

Affirmed.

39 In United States Court of Appeals for the District of Columbia

* * * * * * *

No. 7096. April Term, 1938

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, APPELLANTS

vs.

MARIE ELIZABETH ELG

No. 7097. April Term, 1938

MARIE ELIZABETH ELG, APPELLANT

vs.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE

Judgment

August 1, 1938

Appeal and cross-appeal from the District Court of the United States for the District of Columbia.

These causes came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

On consideration whereof, It is now here ordered adjudged and decreed by this Court that the decree of the said District in these causes be, and the same is hereby, affirmed.

Per Mr. Chief Justice GRONER, August 1, 1938.

40 In United States Court of Appeals for the District of Columbia

Nos. 7096–7097

[Title omitted.]

[File endorsement omitted.]

Designation of record

Filed October 8, 1938

The Clerk in the preparation of transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.
2. Minute entry of the argument.
3. Decision of the Court.
4. Judgment or decree.
5. This designation.
6. Clerk's certificate.

ROBERT H. JACKSON,
Robert H. Jackson,
Solicitor General.

41 [Clerk's certificate to foregoing transcript omitted in printing.]

42 In United States Court of Appeals

Docket entry

October 15, 1938. Appellant Elg's motion for leave to file motion to amended decree. Filed.

43 In United States Court of Appeals

[Titles omitted.]

Order denying motion for leave to file motion to amend decree

October 19, 1938

On consideration of the motion of Marie Elizabeth Elg for leave to file a motion to amend the decree herein, it is ordered by the Court that the motion be, and it is hereby, denied on the ground that the object sought by the proposed motion is fully taken care of in the original opinion.

* * * * * * *

44 In United States Court of Appeals for the District of Columbia

Nos. 7096–7

[Titles omitted.]
[File endorsement omitted.]

Designation of record

Filed October 25, 1938

Now comes the appellant, Marie Elizabeth Elg, by her attorney Henry F. Butler, and designates that in the preparation of transcript of record on petition for certiorari to the Supreme Court of the United States, in addition to the record heretofore certified on designation of Robert H. Jackson, Solicitor General, the following will be included:

1. Docket entry of appellant's motion for leave to file motion to amend decree.
2. Minute entry of denial of above motion and grounds stated.
3. This designation.
4. Clerk's certificate.

HENRY F. BUTLER,
Attorney for Appellant.

45 [Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 454. October Term, 1938

Order allowing certiorari

Filed December 5, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 455. October Term, 1938

Order allowing certiorari

Filed December 5, 1938

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 42939, 42940. U. S. Court of Appeals, District of Columbia. Term No. 454. Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, Petitioners, vs. Marie Elizabeth Elg. Term No. 455. Marie Elizabeth Elg, Petitioner vs. Frances Perkins, Secretary of Labor, Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, et al. Petitions for writs of certiorari and exhibit thereto. Filed November 1, 1938. Term Nos. 454 O. T. 1938, 455 O. T. 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. —

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER of IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH EIG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above entitled case on August 1, 1938 (R. 39), affirming the judgment of the District Court of the United States for the District of Columbia (R. 26).

OPINIONS BELOW

The opinions of the District Court (R. 25–26) and the Court of Appeals (R. 31–39) have not been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 1, 1938 (R. 39). On October 15, 1938, a motion by respondent for leave to file motion to amend the decree of the Court of Appeals was filed (R. 41). This motion was denied on October 19, 1938, "on the ground that the object sought by the proposed motion is fully taken care of in the original opinion" (R. 41). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a native-born citizen of the United States, residing with her father in a foreign state while a minor, lost her American citizenship when she became a citizen of such foreign state through the naturalization of her father therein during her minority.

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 16–19.

STATEMENT

This case arises on the pleadings—the respondent's bill of complaint and exhibits and a motion by the defendants to dismiss. The facts as stated in the bill of complaint and accompanying exhibits may be briefly summarized as follows:

Respondent's father, a Swedish immigrant, became a naturalized citizen of the United States on September 24, 1906 (R. 10a). Respondent was born October 2, 1907, in New York City (Ex. A, R. 8). In 1911 the respondent was taken to Sweden by her mother (R. 2, 10a, 15). On July 25, 1922, respondent's father returned to Sweden, where he has since continued to reside (R. 15, 19). In a communication dated October 30, 1934, from the Swedish Ministry for Foreign Affairs to the American Legation at Stockholm, it was stated that the respondent's father reacquired Swedish nationality by resuming his residence in Sweden and remaining there for a period of two years, and that respondent likewise acquired Swedish nationality under Swedish law if she were residing with him at the time (R. 16–17).[1] Respondent resided with her father from the time he returned to Sweden in 1922 until she came to this country on a passport obtained from the Department of State on July 22, 1929[2] (R. 2–3).

Following the issuance of this passport, respondent arrived in this country on September 17,

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[1] In a report dated November 17, 1934, accompanying this communication (R. 16), the United States Consul at Göteberg, Sweden, stated that the respondent's father resumed Swedish citizenship automatically on July 25, 1924 (two years after he had arrived in Sweden to establish a permanent residence), that since respondent was residing with him at that time, she acquired Swedish nationality, and that both lost their American citizenship by virtue of Section 2 of the Act of March 2, 1907 (*infra*, p. 16) (R. 19–20).

[2] The Secretary of State informed the Attorney General in a letter dated January 21, 1937, that the issuance of this passport was the result of a "clerical inadvertence."

1929 (R. 3). On April 8, 1935, the Immigration and Naturalization Service of the United States Department of Labor wrote her that, following an investigation of her case, it had concluded that she lost her American citizenship and became a Swedish subject when her father became such on July 25, 1924; that, being an alien, her entry on September 17, 1929, could not be regarded as a lawful one for permanent residence since she was then subject to the quota laws and was not in possession of an immigration visa; that it was therefore necessary for her to depart from the United States and thereafter effect an entry in compliance with the existing immigration laws; and that the Service would afford her reasonable opportunity to adjust her present unlawful status. She was also requested to advise the Service when it was her intention to depart from the United States (R. 13). As a result of her protest the Secretary of Labor and the Acting Commissioner of Immigration and Naturalifiation suspended action temporarily, the District Director at Ellis Island being instructed to take no steps looking to the enforced departure of the respondent prior to February 1, 1937, but the Department of Labor nevertheless insisted upon the validity of its holding that the respondent was illegally in the United States and took no action to terminate its threat of deportation (R. 3–4, 14).

On July 16, 1936, the respondent applied to the State Department for a passport as an American citizen (R. 4; Ex. G, R. 14a–14b), but such passport

was refused on July 29, 1936, on the ground that the respondent could not be considered a national of the United States (R. 4, 15–17).

Thereafter, on January 14, 1937, the respondent filed in the United States District Court for the District of Columbia a bill of complaint naming as defendants the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State (R. 1–21). She prayed for a judgment under the Declaratory Judgment Act of June 14, 1934, as amended, declaring that she is a native-born citizen of the United States and is entitled to all the rights and privileges of a citizen of the United States. She also sought to enjoin the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization from instituting and from continuing to prosecute proceedings for the purpose of deporting her from the United States or from in any way interfering with her residence therein. She further prayed that an injunction should be issued against the Secretary of State directing him to refrain from making any statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport on the ground that she is not such a citizen. Finally, a temporary injunction was sought against the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization to restrain them from taking any action looking toward the deportation of the respondent until final judgment had been rendered in the suit (R. 6).

A rule to show cause why the temporary injunction should not be granted was issued (R. 20). A return to the rule to show cause was filed (R. 21–22), which stated, among other things, that the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization had no intention to enforce deportation proceedings pending the outcome of the case (R. 21). In view of this statement the rule to show cause was discharged (R. 22).

Thereafter a motion to dismiss the bill of complaint was filed by the defendants (R. 23–24). The District Court on November 18, 1937, entered judgment sustaining the motion to dismiss as to the Secretary of State, overruling it as to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization and, these defendants having elected to stand upon their motion to dismiss, declaring the respondent to be a natural-born citizen of the United States (R. 26). In its opinion (R. 25–26) the court ruled, in sustaining the motion to dismiss as to the Secretary of State, that it would not undertake by mandamus to compel the issuance of a passport nor to control, by means of a declaratory judgment, the action of one whose function it is to consider and decide whether or not a passport should be issued. With reference to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization the court held that the respondent was entitled to a declaratory judgment, that she is a citizen of the

United States, for the reason that "I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it". (R. 25–26).

On appeals by all parties to the Court of Appeals for the District of Columbia (R. 26–28) the decision of the lower court was in all respects affirmed (R. 31–39). Accepting for the purpose of decision the Government's interpretation of the Swedish laws to the effect that the respondent's father had become repatriated at the end of two years after his return to Sweden for permanent residence and that because of the father's repatriation the respondent had also become a Swedish citizen (R. 35),[3] the court refused to hold that by virtue of Section 2 of the Act of March 2, 1907, *infra*, p. 16, which provides that any American citizen shall be deemed to have expatriated himself when he has become naturalized in any foreign state in conformity with its laws, the respondent had likewise lost

[3] The Government's version of the Swedish law was based upon a translation thereof appearing in "Consular Statute Book of Sweden," published in Stockholm in 1910. It was stipulated in the District Court that the court for the purpose of the motion to dismiss the bill of complaint "may take judicial notice of the statutes of Sweden as the same appear in the English translation" in the book referred to as well as in "Statute Book for Legations and Consulates", dated 1931. The respondent cited to the court below the translation in the latter book (R. 35). (R. 25).

her American citizenship. The court held in effect that even if the respondent became a naturalized Swedish citizen during her minority in that country she had what is known in international law as double citizenship, that upon attaining her majority she had the right to elect to retain her American citizenship by returning to this country, and that she exercised such election when, after becoming *sui juris*, she applied for and received her passport to come to this country. The court also held that the doctrine of election followed from the fundamental rule that a natural born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country, that the change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father, that neither the Act of March 2, 1907, nor any other statute had taken away or diminished those rights, and that "it is doubtful, indeed, if there is any power in Congress, in view of the provisions of the Fourteenth Amendment, to take them away" (R. 35–37).

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals for the District of Columbia erred:

1. In holding that the respondent had not lost her American citizenship.

2. In holding that the respondent did not become expatriated by virtue of Section 2 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228, when considered in connection with the Swedish Nationality Law of 1894, as amended.

3. In holding in effect that the Act of 1907 would be of doubtful constitutionality, if so construed.

4. In failing to hold that the Convention of 1872 between the United States and Norway and Sweden, when read in connection with the Swedish law, accomplished the respondent's expatriation.

5. In holding that if the respondent became a naturalized citizen of Sweden during her minority residence therein, dual citizenship resulted and that she had the right when she reached her majority to elect to retain her American citizenship by returning to this country.

6. In affirming the judgment of the District Court overruling the petitioners' motion to dismiss the bill of complaint and declaring the respondent to be a natural-born citizen of the United States.

REASONS FOR GRANTING THE WRIT

(1) The decision below is in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Reid,* 73 F. (2d) 153 (C. C. A. 9th), certiorari denied, 299 U. S. 544, because the petition was not filed in time. In that case the petitioner, a native-born American, was taken to Canada as a child by her father, who be-

came a naturalized British subject. She married a Canadian citizen while she was a minor and, after attaining majority, returned to the United States, where she sought repatriation under a statute facilitating the naturalization of women who had lost their citizenship by marriage to aliens. Opposing her petition, the Government contended that she did not come within the statute, for the reason that prior to her marriage she had lost her citizenship through her father's naturalization under a Canadian statute which provided that children take on the nationality of a naturalized subject and that a treaty between the United States and Great Britain recognized the British nationality of Americans naturalized according to the laws of the dominions. On appeal the Circuit Court of Appeals for the Ninth Circuit reversed an order of the District Court admitting the petitioner to citizenship, holding that the petitioner became a naturalized citizen of Canada and Great Britain by the naturalization of her father while she was a minor residing with him in Canada and that such naturalization terminated her American citizenship, with the result that she did not come within the terms of the statute under which she sought repatriation. In its opinion the court stated (pp. 155–156):

> For the courts of the United States to treat the petitioner as an American citizen instead of a British subject after the naturalization of her father in 1907, would be to expressly violate the terms of the treaty of

1870 with Great Britain, which required her to be treated by the United States "in all respects and for all purposes as a British subject" from and after that date.

* * * * * *

It cannot be seriously contended that naturalization of the citizens of the contracting powers is not within the treaty-making power of a nation. * * *

* * * * * *

The United States has consistently adhered to the principle that the naturalization of a parent effects the naturalization of a minor child residing with the parent. * * *

* * * * * *

The state department has consistently adhered to this view in dealing with foreign governments concerning the rights of minors naturalized in this country by the naturalization of the father, and vice versa. * * *

* * * * * *

We think that the purpose of the treaty of 1870 with Great Britain, and of the laws enacted in pursuance thereof by both contracting powers, or implicitly recognized thereby was to do away with all cases of dual citizenship arising from the operation of the naturalization laws of the two contracting powers, and that in the case of petitioner there never was such dual citizenship. * * *

(2) The decision below is also contrary to the opinion of the Attorney General dated June 16, 1932, and addressed to the Secretary of Labor, in *Citizenship of Ingrid Therese Tobiassen,* 36 Op.

Atty. Gen. 535. In this case the Attorney General held that Miss Tobiassen, a minor, who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and thereafter maintained a permanent residence, had acquired Norwegian nationality through the naturalization of her father as a Norwegian subject, and consequently ceased to be an American citizen. This opinion has not been superseded by any later opinion.

(3) The Court of Appeals in the instant case recognized in its opinion that its views were contrary to those expressed in the *Reid* and *Tobiassen* cases, when it said (R. 37–38):

> We have carefully examined the opinion of the Attorney General in *Tobiassen's* case, 36 Op. 535, and the case of *United States* v. *Reid*, 73 F. (2d) 153 (certiorari denied on the sole ground that the petition was not filed in time, 299 U. S. 544), upon which appellants rely; and we think that the arguments they make out are not supported by the statute on which they are mainly built, and likewise that the conclusions reached are opposed to the established rules and principles which, it seems to us, not only should apply but since the adoption of the Constitution have been applied.[4]

[4] The court below made no distinction between the instant case and the *Reid* and *Tobiassen* cases on the basis of any difference in substance between the treaties and foreign

(4) The view of the legislative branch of the Government appears also to be opposed to the decision below. This is indicated by the Act of June 25, 1938 (Private, No. 751, 75th Cong., 3d Sess.), which authorized the naturalization of one Albin H. Youngquist. This Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the administration of the immigration laws Albin H. Youngquist, a native-born citizen of the United States who involuntarily lost his citizenship at the age of five years by reason of the naturalization of his father as a citizen of Canada, shall be held and considered to have been legally admitted to the United States for permanent residence.
>
> SEC. 2. Notwithstanding any other provision of law, said Albin H. Youngquist may be naturalized as a citizen of the United States by filing a declaration of intention and taking the oath of allegiance in the manner prescribed in the naturalization laws before any court having jurisdiction of the naturalization of aliens.[5]

In the report of the Senate Committee on Immigration which accompanied the bill (Senate Re-

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statutory provisions involved. Indeed, in the *Tobiassen* case the same treaty provisions were involved as are applicable in the present case.

[5] A similar private statute was passed in respect of one James Lincoln Hartley (Act of July 13, 1937, c. 493, 50 Stat., pt. 2, p. 1030).

port No. 1613, 75th Cong., 3d Sess.), it was stated (p. 1):

> * * * The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. * * *

(5) The decision of the court below is, moreover, in conflict with the decisions of the Supreme Court of Minnesota in *Ostby* v. *Salmon*, 177 Minn. 289, and *Koppe* v. *Pfefferle*, 188 Minn. 619. In these cases it was held that minors removed from this country to Canada, where their fathers, during the minors' infancy, were naturalized as British subjects, were not restored to American citizenship upon their return to Minnesota while minors and hence had no right to vote when they attained their majority.

(6) The question decided below is one which involves the construction of the Constitution as well as a treaty and statutes of the United States and obviously is one of general importance. The lack of uniformity resulting from the decision below, unless resolved by this Court, will necessarily make uncertain in future cases the procedure to be followed by the executive branch of the Government and will leave in doubt the status of a minor native-born citizen of the United States who has been invested with the citizenship of another country by the action of his or her father in becoming a cit-

izen of that other country. As is apparent from a letter from the Solicitor of Labor to the Attorney General dated October 18, 1938, which is printed as Appendix B (*infra*, p. 20), there are a large number of persons in the same situation as the respondent herein. This petition is submitted in order that the conflict in the relevant holdings may be resolved and an authoritative decision secured to govern the executive departments in the administration of the law. For the reasons stated, it is believed that a decision herein will be in the public interest.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

GERARD D. REILLY,
Solicitor, Department of Labor.

GREEN H. HACKWORTH,
Legal Adviser, Department of State.

NOVEMBER 1938.

APPENDIX A

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution as pertinent provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

Act of April 14, 1802, c. 28, 2 Stat. 153, as pertinent provides:

> *And be it further enacted,* That the children of persons duly naturalized under any of the laws of the United States * * * being under the age of twenty-one years, at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States * * *.

Act of March 2, 1907, c. 2534, Sec. 2, 34 Stat. 1228 (U. S. C., Title 8, Sec. 17), provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.
>
> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said

years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Articles I and III of the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 809–810), provides:

ART. I

Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such * * *

ART. III

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original

country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article III of the Protocol to the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 812–13), provides:

> Relating to the third article of the convention.
>
> It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.
>
> The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

Article VIII of the Swedish Law on the Acquisition and Loss of Citizenship, dated the 1st of October, 1894, as amended May 7, 1909, provides (Consular Statute Book of Sweden, 1910, pp. 2–3):

> Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.
>
> If the King has entered into a convention with a foreign Government, that any person previously of Swedish nationality having acquired citizenship in that foreign country

shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him.

APPENDIX B

OCTOBER 18, 1938.

THE HONORABLE
THE ATTORNEY GENERAL.

MY DEAR MR. ATTORNEY GENERAL: For the information of your Department in connection with the case of Perkins et al. *v.* Elg, decided by the United States Court of Appeals for the District of Columbia, you are informed that the following is a statement of the cases which arose under the immigration laws involving persons who were native-born citizens of the United States, but whom this Department was obliged to treat as aliens and as subject to all the restrictive provisions of the Immigration Laws as the result of the decision of your Department in the case of Ingrid Therese Tobiassen (36 Ops. Atty. Gen. 535):

Number of persons who were arrested in the United States and deported therefrom	25
Number of persons involved in cases of the same character which are now pending awaiting final disposition	200
Number of persons who, upon appearing before, and making application to, the immigration authorities for admission to the United States were ordered excluded and deported therefrom	500
Number of persons involved in cases of the classification last described which are now pending awaiting final disposition	10

The foregoing statistics were compiled from a canvass actually made a year or two ago by the appropriate officials of the Immigration and Naturalization Service throughout the United States, its Territories, and the insular possessions in

which the immigration laws are administered by such officials. To those actual figures there were added an estimate of the approximate number of similar cases which arose since the canvass in question was made.

I trust that the information will be sufficient for the purposes for which it is desired.

Respectfully,

GERARD D. REILLY,
Solicitor of Labor.

EJG/gs

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No. 464

In the Supreme Court of the United States

OCTOBER TERM, 1938

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the District Court (R. 27) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 33–40) is reported in 99 F. (2d) 408.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia was entered August 1, 1938 (R. 41). The petition for a writ of certiorari was filed November 1, 1938, and granted December 5,

1938. The jurisdiction of this Court to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a native-born citizen of the United States, residing with her father in Sweden while a minor, lost her American citizenship when she became a citizen of the Kingdom of Sweden through the repatriation of her father therein during her minority.

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

These are set forth in Appendix A, *infra*, pp. 70–77.

STATEMENT

This case arises on the pleadings, i. e., upon the respondent's bill of complaint with exhibits attached and upon the defendant's motion to dismiss the bill of complaint. The record discloses: that the respondent's parents were born in Sweden (R. 8); that some time prior to 1906 they emigrated to the United States and the father, Gustav Elg, was naturalized before the District Court of the United States at Brooklyn, New York, on September 24, 1906 (R. 14a, Ex. G); that the respondent was born in Brooklyn, New York, on October 2, 1907 (R. 8, Ex. A); that in 1911 the respondent's mother returned to Sweden, taking the respondent with her (R. 2, 15); that respondent continued her residence uninterruptedly with her mother in Sweden until September 7, 1929 (R. 3, 15); that in

July 1922 the respondent's father returned to Sweden, where he has since continued to reside (R. 15, 17, 20); that the respondent's father on November 13, 1934, made the following statement before an American Consul at Sweden (R. 17):

> I, Gustav Elg, now a resident of Grebbestad, Sweden, do hereby solemnly declare:
>
> That I have voluntarily expatriated myself for the reason that I did not desire to retain the status of an American citizen;
>
> That my permanent residence in the United States has been voluntarily abandoned and that I neither intend nor desire to resume permanent residence in the United States.
>
> * * * * *
>
> And that I neither intend nor desire to preserve my allegiance to the United States, but intend and desire to preserve my allegiance to Sweden.

The respondent resided with her father from the time he returned to Sweden in 1922 until she came to this country on a passport obtained from the Department of State on July 22, 1929.[1] In her application for said passport, dated May 13, 1929, the respondent stated that her father was residing in Sweden for the purpose of permanent residence (R. 12a, Ex. C).

In a communication dated October 30, 1934, from the Swedish Ministry for Foreign Affairs to the

[1] The Secretary of State informed the Attorney General in a letter dated January 21, 1937, that the issuance of this passport was the result of a "clerical inadvertence."

American Legation at Stockholm, it was stated that the respondent's father reacquired Swedish nationality by resuming his residence in Sweden and remaining there for a period of two years, and that respondent likewise acquired Swedish nationality under Swedish law if she were residing with him at the time (R. 17).[2]

After investigating the lawfulness of the respondent's entry into this country, the Immigration and Naturalization Service of the United States wrote the respondent under date of April 8, 1935, that it had concluded that she had lost her American citizenship and became a Swedish subject when her father became such on July 25, 1924; that, being an alien, her entry on September 17, 1929, could not be regarded as a lawful one for permanent residence since she was then subject to the quota laws and was not in possession of an immigration visa; that it was therefore necessary for her to depart from the United States and thereafter effect an entry in compliance with the existing immigration laws; and that the Service would afford her reasonable opportunity to adjust her

[2] In a report dated November 17, 1934, accompanying this communication (R. 17), the United States Consul at Goteberg, Sweden, stated that the respondent's father resumed Swedish citizenship automatically on July 25, 1924 (two years after he had arrived in Sweden to establish a permanent residence), that since respondent was residing with him at that time, she acquired Swedish nationality, and that both lost their American citizenship by virtue of Section 2 of the Act of March 2, 1907 (R. 20-21).

present unlawful status. She was also requested to advise the Service when it was her intention to depart from the United States (R. 13–14). As a result of her protest the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization suspended action temporarily, the District Director at Ellis Island being instructed to take no steps looking to the enforced departure of the respondent prior to February 1, 1937, but the Department of Labor nevertheless insisted upon the validity of its holding that the respondent was illegally in the United States and took no action to terminate its threat of deportation (R. 3–4, 14).

On July 16, 1936, the respondent applied to the State Department for a passport as an American citizen (R. 4, Ex. G, R. 14a–14b), but such passport was refused on July 29, 1936, on the ground that the respondent could not be considered a national of the United States (R. 4–5, 15–18).

Thereafter, on January 14, 1937, the respondent filed in the United States District Court for the District of Columbia a bill of complaint naming as defendants the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State (R. 1–21). She prayed for a judgment under the Declaratory Judment Act of June 14, 1934, as amended, declaring that she is a native-born citizen of the United States and is entitled to all the rights and privileges of a citizen of the United States. She also sought to enjoin the

Secretary of Labor and the Acting Commissioner of Immigration and Naturalization from instituting and from continuing to prosecute proceedings for the purpose of deporting her from the United States or from in any way interfering with her residence therein. She further prayed that an injunction should be issued against the Secretary of State directing him to refrain from making any statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport solely on the ground that she is not such a citizen. Finally, a temporary injunction was sought against the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization to restrain them from taking any action looking toward the deportation of the respondent until final judgment had been rendered in the suit (R. 6).

A rule to show cause why the temporary injunction should not be granted was issued (R. 21). A return to the rule to show cause was filed (R. 22–23), which stated, among other things, that the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization had no intention to enforce deportation proceedings pending the outcome of the case (R. 22). In view of this statement the rule to show cause was discharged (R. 24).

Thereafter a motion to dismiss the bill of complaint was filed by the defendants (R. 24–26). The District Court on November 18, 1937, entered judgment sustaining the motion to dismiss as to

the Secretary of State, overruling it as to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization and, these defendants having elected to stand upon their motion to dismiss, declaring the respondent to be a natural-born citizen of the United States (R. 28). In its opinion (R. 27–28) the court ruled, in sustaining the motion to dismiss as to the Secretary of State, that it would not undertake by mandamus to compel the issuance of a passport nor to control, by means of a declaratory judgment, the action of one whose function it is to consider and decide whether or not a passport should be issued. With reference to the Secretary of Labor and the Acting Commissioner of Immigration and Naturalization the court held that the respondent was entitled to a declaratory judgment, that she is a citizen of the United States, for the reason that "I do not think that the fact that her father may have become a citizen of Sweden, can deprive her of her rights as a native-born citizen of the United States, even though under the laws of Sweden she may be treated in that country as a citizen of it" (R. 28).

On appeals by all parties to the Court of Appeals for the District of Columbia (R. 28–30) the decision of the lower court was in all respects affirmed (R. 33–41). Accepting for the purpose of decision the Government's interpretation of the Swedish laws to the effect that the respondent's father had

become repatriated at the end of two years after his return to Sweden for permanent residence, and that because of the father's repatriation the respondent had also become a Swedish citizen (R. 35),[3] the court refused to hold that by virtue of Section 2 of the Act of March 2, 1907, *infra*, p. 41, which provides that any American citizen shall be deemed to have expatriated himself when he has become naturalized in any foreign state in conformity with its laws, the respondent had likewise lost her American citizenship. The court held, in effect, that even if the respondent became a naturalized Swedish citizen during her minority in that country she had what is known in international law as dual citizenship; that upon attaining her majority she had the right to elect to retain her American citizenship by returning to this country; and that she exercised such election when, after becoming *sui juris*, she applied for and received her passport to come to this country. The court also held that the doctrine of election followed from the fundamental rule that a natural-

[3] The Government's version of the Swedish law was based upon a translation thereof appearing in "Consular Statute Book of Sweden," published in Stockholm in 1910, *infra*, p. 73. It was stipulated in the District Court (R. 27), that upon the hearing of the cause the court "may take judicial notice of the statutes of Sweden as the same appear in the English translation" in the book referred to as well as in "Statute Book for Legations and Consulates," dated 1931. The respondent cited to the court below the translation in the latter book, see *infra*, p. 75 (R. 36).

born citizen of the United States retains his citizenship until he changes it himself in due form and voluntarily becomes a citizen of some other country, that the change can neither be worked by the father nor by the sovereignty into which the child involuntarily is taken, for under the English and American doctrine the child himself acquires rights and owes fealty besides that which attaches to the father; that neither the Act of March 2, 1907, nor any other statute had taken away or diminished those rights; and that "it is doubtful, indeed, if there is any power in Congress—in view of the provisions of the Fourteenth Amendment—to take them away" (R. 35–37).

SUMMARY OF ARGUMENT

I

Respondent was born in the United States, an American citizen, in 1907. Her father, a naturalized Swede, returned to Sweden in 1922 and set up a permanent residence there. Under a 1869 Convention between the United States and Sweden, by renewing his residence in Sweden without intent to return to America, a fact shown by his residence in Sweden for more than two years, he renounced his American citizenship. Under the Swedish statute he thereby regained his Swedish citizenship, and since his daughter was domiciled in Sweden, having been taken there in 1911 by her mother, she also acquired Swedish citizenship.

II

Respondent acquired Swedish citizenship and also resided in Sweden for more than five years. Therefore she lost her American citizenship under Article I of the Convention with Sweden, which provides that United States citizens who have continuously resided in Sweden for five years, and "have become and are lawfully recognized as citizens of Sweden * * * shall be held by the government of the United States to be Swedish * * * citizens, and shall be treated as such."

The language of the treaty, referring to citizens of one country who become citizens of, or "naturalized" in, the other country, is apt to embrace the situation of minors acquiring derivative citizenship through the acts of their parents, a situation obtaining under the United States naturalization statutes since 1790. The treaty was intended to remove conflicts over "dual allegiance," which would occur if respondent retained her American citizenship and also acquired a Swedish citizenship. This and similar naturalization treaties have received a practical construction, in several considered opinions of the State Department, applying them to minors acquiring derivative citizenship. The judicial authorities, considering an almost identical treaty, are to the same effect.

Moreover, respondent's acquisition of Swedish citizenship of itself operated to terminate her American citizenship under Section 2 of the Act of March 2, 1907, which provides that any Ameri-

can citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws. Congress has recognized this in private Acts providing for the repatriation of persons situated similarly to respondent.

III

Such an expatriation is not unconstitutional. The Fourteenth Amendment declares that persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. But Congress has an implied power to expatriate because of occurrences subsequent to such birth or naturalization, subject to restrictions of reasonableness. Whatever objection there may be against the expatriation of an adult except because of some action voluntarily undertaken by him, it is reasonable to prescribe that a minor's citizenship may be terminated through his naturalization abroad by virtue of the naturalization of a parent. Historical analogy, and considerations of domestic and international policy, suggest that, especially in matters of nationality, the family may appropriately be regarded as a unit. Thus, since 1790, Congress has provided that the naturalization of a parent confers citizenship upon minor children if dwelling within the United States.

In any event, the Convention with Sweden is not unconstitutional. It deals with a subject within the province of the treaty power. And it does not contravene any provision of the Constitution placing

restrictions upon government. Finally, as stated above, the declaration in the Fourteenth Amendment of the citizenship attaching to birth does not provide a guaranty against expatriation on reasonable conditions, including the acquisition by a minor of derivative citizenship in another country.

ARGUMENT

RESPONDENT IS NOT A CITIZEN OF THE UNITED STATES

I. RESPONDENT, WHILE A MINOR, ACQUIRED SWEDISH CITIZENSHIP BY VIRTUE OF HER FATHER'S RESUMPTION OF SWEDISH CITIZENSHIP AND HER RESIDENCE IN SWEDEN

Respondent was born in the United States on October 2, 1907 (R. 8). Previously, on September 24, 1906, her father, a Swedish immigrant, had become a naturalized citizen of the United States (R. 14a) and had thereby lost his Swedish citizenship. See article I of the Convention between the United States of America and Sweden and Norway, signed May 26, 1869, and proclaimed January 12, 1872 (17 Stat. 809–810), *infra*, p. 71; Article 5 of the Swedish Law on the Acquisition and Loss of Citizenship, dated October 1, 1894, *infra*, p. 74. Under the laws of the United States respondent was born with United States citizenship, and under Swedish law she was not born with Swedish citizenship.

In 1911 respondent was taken to Sweden by her mother (R. 2, 12a, 15). On July 25, 1922, her father returned to Sweden, where he has since con-

tinued to reside (R. 15, 20, 33). Article III of the Convention between the United States of America and Sweden and Norway, *infra*, p. 72, provides:

> If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article III of the Protocol to the Convention, *infra*, p. 73, provides:

> III. Relating to the third article of the convention.
>
> It is further agreed that if a Swede or Norwegian who has become a naturalized citizen of the United States renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.
>
> The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

And paragraph 2 of Article 8 of the Swedish Law on the Acquisition and Loss of Citizenship, dated October 1, 1894, as amended May 7, 1909, *infra*, p. 74, provides:

> If the King has entered into a convention with a foreign Government that any person

> previously of Swedish nationality having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

There is nothing to show that respondent's father ever intended to return to the United States. Respondent's first application for a United States passport, dated May 13, 1929, stated that her father had taken up a permanent residence in Sweden (R. 12a). The only statement made by him, on November 13, 1934, affirmed his abandonment of residence in, and of allegiance to, the United States (R. 17). Therefore it is plain that, at the latest, on July 25, 1924, the date marking his two years' residence in Sweden, he resumed his Swedish citizenship and lost his United States citizenship.

Upon her father's resumption of Swedish citizenship, respondent, until then a citizen of the United States, also acquired Swedish citizenship. This conclusion follows from paragraph 3 of Article 8 of the Swedish Law just referred to, which provides:

> If, in accordance with the above stipulations of this article, Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife

> and legitimate children under age; unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him.

In the trial court the parties stipulated that the court might take judicial notice of the statutes of Sweden as translated in "Consular Statute Books of Sweden" (1910), and "Statute Book for Legations and Consulates" (1931). The translation set out in the preceding paragraph appears in the former book (see *infra*, p. 74). The latter (*infra* p. 76) reads that Swedish citizenship shall accrue to the minor children—

> unless, * * * they are not resident in Sweden at the time when the husband-father recovers Swedish citizenship, or have not lost along with him citizenship in the foreign country.

It is the Government's understanding that under Swedish law it suffices to confer citizenship upon the minor that the child be resident in Sweden. The respondent construes the statute to require not only a residence in Sweden, but also a loss of foreign citizenship, a requirement which in this case would present a difficult question of *renvoi*.

Although a question of foreign law is one of fact in the sense that generally it has to be proved by evidence (e. g., see *Dainese* v. *Hale*, 91 U. S. 13, 20), this Court has recently left open the question

whether a finding of the trial court would be conclusive if supported by evidence or whether, for purposes of appeal, it may be reviewed as a question of fact and law compounded (*Shapleigh* v. *Mier*, 299 U. S. 468, 472). In the instant case there is no finding. Both the District Court (R. 28) and the Court of Appeals (R. 37) granted the correctness of the Government's construction and, applying that construction, rendered judgment against the Government. If, as the Government submits, the grounds taken by the court below are erroneous and this Court so holds, the question of FOREIGN law left undecided becomes material, and the Court can remand the cause for a determination of that question. On review of judgments of the Court of Claims, this Court has considered the legal questions, determined that under the law certain issues of fact were material, and remanded for findings on these issues. *Universal Battery Co.* v. *United States*, 281 U. S. 580, 584; *Winton* v. *Amos*, 255 U. S. 373.

If the Court determines to adjudicate this preliminary issue prior to considering the larger issues in the case, we submit that the statute requires either residence or expatriation as alternative conditions; that it confers Swedish citizenship on all legitimate minor children residing with their father at the time of his resumption of Swedish citizenship; and that the other clause was only meant to save from complete statelessness those minors resi-

dent in another country who lose their citizenship therein.

This construction is the only one which harmonizes with a further provision of the Swedish Law of May 7, 1909, which reads in substantially the same way in both volumes translating the Swedish statutes (*infra*, pp. 74, 76), and provides that the law comes into force immediately after promulgation; that anyone previously a Swedish citizen then resident in Sweden who has lost alien citizenship in accordance with an agreement with a foreign country—

> shall recover Swedish citizenship on the coming into force of this Law. If Swedish citizenship is recovered by a husband in that way, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, provided they are *either* resident in Sweden when the Law comes into force *or* have lost citizenship in the foreign country along with the husband-father. [Italics added.] [4]

By parity of reasoning, it is clear that subsequent acquisition of citizenship by a minor is satisfied by either of these two alternative conditions.

Moreover, according to the letter written to respondent by R. B. Shipley, Chief of the Passport Division of the Department of State, the Swedish Ministry for Foreign Affairs has informed the

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[4] The wording in the 1931 volume (*infra*, p. 76), has been used to avoid any possible dispute.

American Legation at Stockholm that respondent's father recovered Swedish nationality by resuming a Swedish residence and that if respondent were residing with him at that time she "also acquired Swedish nationality under Swedish law" (R. 17).

II. BY VIRTUE OF THE ACQUISITION OF SWEDISH CITIZENSHIP, RESPONDENT LOST HER AMERICAN CITIZENSHIP

A. Convention between United States and Sweden

Respondent arrived in Sweden with her mother in 1911. Her legal domicile there presumably commenced with the arrival of her father on July 25, 1922 (R. 15, 20, 33). She did not begin to inquire about returning to the United States until June 1928 (R. 2, 10), and did not leave Sweden until September 7, 1929 (R. 3). This residence of more than five years duration, during which respondent became a citizen of Sweden (see point 1, *supra*), brings respondent within the coverage of Article I of the Convention between the United States and Norway and Sweden, *infra*, p. 71. That article provides:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.
>
> Reciprocally, citizens of Sweden or Norway who have resided in the United States

> of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such. * * *

1. The language is apt to cover the situation of a minor acquiring citizenship by virtue of his parent's naturalization. Since 1790 the Acts of Congress have declared the principle that a minor child of a person duly naturalized shall, if dwelling in the United States, be considered a citizen thereof.[1] A person is "naturalized" although admitted to citizenship not by formal court order, but by marriage (see Mr. Justice Harlan in *United States* v. *Kellar*, 13 Fed. 82, 85 (C. C. S. D. Ill.)) or by the naturalization of a parent under the statutes cited, by virtue of which he "is as completely naturalized as if he had complied with the conditions of the general naturalization laws of the United States" (Mr. Hay, Sec. of State to Mr. Storer, Min. to Belgium, For. Rel. 1899, 87). Therefore, the reference in the Convention to citizens of Sweden who have become naturalized citizens of the United States embraces the acquisition of derivative citizenship by a minor. And, in view of the Swedish law of 1894, as amended, re-

[1] Act of March 26, 1790, c. 3, 1 Stat. 103; Act of January 29, 1795, c. 20, 1 Stat. 414, 415; Act of April 14, 1802, c. 28, Sec. 4, 2 Stat. 155, *infra*, Appendix, p. 70; Rev. Stat. Sec. 2172 (8 U. S. C. Sec. 7).

spondent is an American citizen who has "become" and is "lawfully recognized as" a citizen of Sweden.

Moreover, even were the wording less clear, the familiar canon would require that the treaty be construed liberally, as extending the privileges given up by each nation under it. *Geofroy* v. *Riggs*, 133 U. S. 258, 271; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Laubenheimer* v. *Factor*, 290 U. S. 276, 293.

2. Consideration of the history and purpose of this Convention, as well as its language, reenforces the conclusion that Article I was intended to embrace all cases of naturalization, including the acquisition of citizenship by minor children through the naturalization of the father, and that the acquisition of Swedish citizenship with the prescribed residence was intended to effect an expatriation from American citizenship.

Reference may here be made to the history of the emergence of the American doctrine of expatriation. Under original British doctrine, allegiance was immutable, and could not be changed without the declared consent of the government. See *Mackenzie* v. *Hare*, 239 U. S. 299, 308–309. That this also constituted the doctrine applicable to the United States is indicated in *Shanks* v. *Dupont*, 3 Pet. 242, 246 (1830), where Mr. Justice Story said: "The general doctrine is, that no person, can by any act of their own, without the consent of the govern-

ment, put off their allegiance, and become aliens." See also 2 Kent, *Commentaries*, Sec. 49.

But, as succinctly summarized by this Court in *Mackenzie* v. *Hare, supra*, 309, this judicial viewpoint "would seem to have been repelled by the naturalization laws, and it was certainly opposed to executive opinion; and, we may say, popular sentiment, so determined that it sought its vindication by war." Since 1795 the naturalization statutes have required an applicant to declare on oath that he absolutely and entirely renounces and abjures "all allegiance and fidelity to every foreign prince, state, or sovereignty whatever," and particularly that of which he was formerly a subject.* There has never been a condition in our naturalization statutes requiring the consent of such foreign state, and, of course, the practice from the first was to naturalize citizens of countries, like England, which did not so consent. The Congress apparently maintained that the individual alone could terminate his allegiance.

The refusal of the English Government to recognize the allegiance to it as terminated by American naturalization (easily secured by British sailors), a disagreement rendered grievous by Great Britain's action in impressing seamen and executing its municipal law on board American ves-

* Act of January 29, 1795, c. 20, 1 Stat. 414; Act of April 14, 1802, c. 28, 2 Stat. 153; Rev. Stat. Sec. 2165; Act of June 29, 1906, c. 3592;, p. 4, 34 Stat. 596 (8 U. S. C. Sec. 381).

sels, was a factor which contributed to the War of 1812,[7] although not mentioned in the Treaty of Peace.

Inasmuch as other countries did not recognize a general right of expatriation without the prior declared consent of the sovereign, conflicts arose, especially over the liability to military duty, etc., of immigrants naturalized in the United States and revisiting their country of origin. Although the earlier utterances of the State Department indicated that such a person returning to his native land would have to obey its laws exactly as if he had never emigrated,[8] Mr. Buchanan, as Secretary of State, took the firm position that naturalized citizens were in all respects equal to native citizens and entitled to the same protection.[9] This doctrine was applied again, after an interim period marking an apparent recession,[10] in the administration of Mr. Buchanan as President[11] and forcibly stated by Attorney General Black in considering the case of

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[7] Moore, *American Diplomacy* (1905), pp. 173–174; 1 Muzzey, *The United States of America* (1933 ed.) 237; 4 Channing, *History of the United States* (1938 ed.) 367; 1 *Encyclopedia Britannica* (14 ed.) 645.

[8] See 3 Moore, International Law Digest, p. 564, especially Mr. Wheaton, min. to Prussia, to Mr. Knoche, July 24, 1840, printed in S. Ex. Doc. No. 38, 36th Cong., 1st Sess., pp. 6, 7.

[9] See Mr. Buchanan, Sec. of State, Instructions, 1845–1848, 3 Moore, Int. Law Digest, pp. 566–567; Moore, *American Diplomacy*, p. 174.

[10] See 3 Moore, Int. Law Digest, p. 567 *et seq.*

[11] See Letters of Mr. Cass, Secretary of State, 1859, 1860, 3 Moore Int. Law Digest, 571–573.

Christian Ernst, a native of Hanover who emigrated from Hanover at the age of nineteen, was naturalized in the United States, and forced into the Hanoverian Army on a subsequent visit.[12] On protest, the Hanoverian Government dismissed Ernst from military service but added that similar conflicts could be prevented in the future only by the United States renouncing its views, or concluding a special agreement.[13]

The position set forth by Attorney General Black was adopted by Congress and enacted as the law of the land, in the Act of July 27, 1868, c. 249, 15 Stat. 223.[14] Intended as a first step in the resolution of international disputes,[15] it enunciated a clarifying declaration of the position of the United States, as follows:

> Whereas the right of expatriation is a natural and inherent right of all people, in-

[12] See 9 Op. A. G. 356, holding the doctrine of perpetual allegiance not to be sound international law, and reaffirming the identity of position of the naturalized and native citizen.

[13] Letter, Baron Reitzenstein to Mr. Wright, Min. to Hanover, August 20, 1859, printed in S. Ex. Doc. No. 38, 36th Cong., 1st Sess. 143, noted in 3 Moore, Int. Law Digest 575.

[14] "The immediate occasion which called forth the law was the arrest of certain naturalized citizens by the authorities of their parent countries, chiefly the German States, for nonperformance of military service, and numerous arrests of naturalized citizens of Irish origin in the United Kingdom charged with crimes of a political character." See H. Doc. 326, 59th Cong., 2d Sess., p. 10.

[15] See H. R. Rept. 13, 40th Cong., 2d Sess., p. 19, accompanying a predecessor bill, H. R. No. 584.

dispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic. (8 U. S. C. Sec. 15.)

Shortly before, on February 22, 1868, George Bancroft, on behalf of the United States, had concluded a naturalization treaty with the North German Union,[18] and several substantially identical treaties, including the one with Norway and

[18] 15 Stat. 615. "Article I. Citizens of the North German Confederation, who become naturalized citizens of the United States of America and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

"Reciprocally: citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within

Sweden, were concluded soon afterward.[17] These treaties and conventions eliminated international disputes and disputation simply by the agreement of one country to recognize the termination of the citizenship of a person later acquiring citizenship in the other country. The felicity of these pacts is demonstrated by the fact that treaties have since been concluded with twelve other countries.[18]

North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such. * * *" (Flournoy and Hudson, Nationality Laws, p. 660.)

[17] Bavaria, May 26, 1868 (15 Stat. 661); Baden, July 19, 1868 (16 Stat. 731); Wurtemberg, July 27, 1868 (16 Stat. 735); Hesse, August 1, 1868 (16 Stat. 743); Belgium, November 16, 1868 (16 Stat. 747); Sweden and Norway, May 26, 1869 (17 Stat. 809); Great Britain, May 13, 1870 (16 Stat. 775); Austria-Hungary, September 20, 1870 (17 Stat. 833); Denmark, July 20, 1872 (17 Stat. 941). These treaties are collected in Flournoy and Hudson, Nationality Laws, 661–673. Those with the German states are no longer in force.

[18] Haiti, March 22, 1902 (33 Stat. 2101); Peru, October 15, 1907 (36 Stat. 2181); Brazil, April 27, 1908 (36 Stat. 2444); Salvador, March 14, 1908 (35 Stat. 2038); Honduras, June 23, 1908 (36 Stat. 2160); Portugal, May 7, 1908 (35 Stat. 2082); Uruguay, August 10, 1908 (36 Stat. 2165); Nicaragua, December 7, 1908 (37 Stat. 1560); Costa Rica, June 10, 1911 (37 Stat. 1603); Bulgaria, November 23, 1923 (43 Stat. 1759); Czechoslovakia, July 16, 1928 (46 Stat. 2424); Albania, April 5, 1932 (49 Stat. 3241).

In addition to these bipartite pacts is the multilateral Convention signed at Rio de Janeiro August 13, 1906, establishing that naturalized citizens taking up permanent residence in the country of origin shall be held to have renounced citizenship in the country of naturalization. This Convention was ratified by the United States (37 Stat. 1653), and is in force in the following countries: Argentina, Brazil, Chile, Colombia, Costa Rica, Honduras, Nicaragua, Panama, and El Salvador.

With respect to countries not parties to such agreements, difficult questions arise. While this Government has consistently maintained that a person who becomes a naturalized citizen of this country should not be regarded as having a dual status or the obligations of original citizenship if he visits the country of his origin, its efforts in this direction have not had the desired success.[19] In this connection, President Harrison in his annual message to the Congress delivered in 1889 said (For. Rel. 1889, VIII):

> Questions continue to arise in our relations with several countries in respect to the rights of naturalized citizens. Especially is this the case with France, Italy, Russia, and Turkey, and to a less extent with Switzerland. From time to time earnest efforts have been made to regulate this subject by conventions with those countries. An improper use of naturalization should not be permitted, but it is most important that those who have been duly naturalized should everywhere be accorded recognition of the

[19] Mr. Lansing, Secretary of State to Senator Hitchcock, Sept. 8, 1916, For. Rel. 1916, 426; Wigmore, Double Allegiance, 21 Ill. L. Rev. 761, 770; Borchard, Diplomatic Protection of Citizens Abroad (1915) 576.

The State Department has been forced to call the attention of its naturalized citizens seeking to revisit certain native countries, that the United States could not protect them from obligations the native country might impose. Notice to Bearers of Passports (Revised to September 15, 1934), Passport Series No. 2, Department of State, Washington, D. C.; see also letter of Sec. of State Lansing to Senator Lodge, June 9, 1915, For. Rel. 1915, 562.

> rights pertaining to the citizenship of the country of their adoption. The appropriateness of special conventions for that purpose is recognized in treaties which this Government has concluded with a numbtr of European states, * * *.[20]

It is submitted that in view of the purpose of the convention with Sweden, as well as the other treaties discussed, negotiated to avoid conflict over dual allegiance problems, it should be construed to embrace the situation of a minor naturalized through his parent's naturalization, and to prevent any double allegiance from arising in that situation. See *Ostby* v. *Salmon,* 177 Minn. 288, 293 (1929); 34 Columbia Law Rev. 1366.

3. It cannot be asserted that the acquisition of citizenship by a minor is a situation beyond the contemplation of the contracting parties to these naturalization treaties. As stated above, since 1790 the United States has had a policy of conferring citizenship on minor children of duly naturalized persons if dwelling within the United States. The statute of Great Britain changing its traditional doctrine of dual allegiance and adopting the doctrine of expatriation (33 Vict. c. 14) passed on May 12, 1870, in preparation for the treaty with the United States signed the next day, not only conferred citizenship on the minor children of those naturalized (Sec. 10 (5)), but also expressly ex-

[20] See also Annual Message of President Cleveland, For. Rel. 1885, XIV.

patriated minors thus acquiring foreign citizenship (Sec. 10 (3)). And in the recent treaties with Bulgaria, Czechoslovakia, and Albania,[21] where the word "naturalized" was defined so as to exclude women marrying aliens, there was expressly retained within the definition the situation of a minor child acquiring citizenship through the naturalization of his parent. This did not depart from the usual coverage of minors in the naturalization treaties, but clarified this aspect of the treaties which had previously given rise to some question (*infra*, pp. 29–35).

In addition, Article 8 of the Swedish Citizenship Act, discussed, *supra*, pp. 14–17, itself passed as legislation implementing the international convention,[22] explicitly recognized that the repatriation of a former citizen might involve the expatriation of his minor children, whether the crucial clause is used in the disjunctive or conjunctive.

Finally, it seems significant that the contemporaneous Act of July 27, 1868, *supra*, pp. 23–24, occasioned by international disputes like those which prompted the Bancroft treaties, and the passage of which was facilitated by the conclusion of these treaties,[23] made declaration of the right of expatriation after a recital that foreign states were

[21] See *supra*, note 18.

[22] Sweden's sole naturalization pacts are with the United States and Argentina. See Flournoy and Hudson, *Nationality Laws* (1929), pp. 667, 676.

[23] See Moore, American Diplomacy, p. 188.

claiming the allegiance of naturalized American citizens "with their descendants." This phrase is apt to embrace both children born in this country and children deriving United States citizenship through the naturalization of their parents. That the latter were within the contemplation and concern of the Congress is also seen from Section 2 of the Act (8 U. S. C., Sec. 13) which provides that "all naturalized citizens" shall be entitled abroad to the same diplomatic protection accorded native-born citizens.

4. Practical construction is an aid in the interpretation of treaties. *In re Ross,* 140 U. S. 453, 466; *Nielsen* v. *Johnson,* 279 U. S. 47, 52. Of particular importance in the interpretation of the Convention with Sweden, and of similar naturalization treaties, is the considered position taken by the State Department that the acquisition of United States citizenship by a foreign-born child through the naturalization of a parent, being deemed equivalent to naturalization, falls within the naturalization treaties.

Mr. Grip, the Swedish Minister in Washington on June 8, 1897, asked the Department of State for a construction of the treaty between the Untied States and Sweden (the treaty here involved) as it applied to a minor child born in Sweden who came to this country with his parents and was naturalized through the naturalization of his parents. The

inquiry was: "What is the effect of a person's return to his native country for a visit on his rights as an American citizen acquired through the naturalization of his father?" Secretary of State Sherman, on June 15, 1897, replied as follows (see Appendix B, *infra*, p. 77):

> The acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes, above quoted, is in its effects upon the individual as much an act of naturalization as is the admission of the father to citizenship by a decree of a competent court. Consequently this Government holds that a minor so naturalized is entitled to all the benefits of a naturalization treaty with the country of his origin, his case differing only from that of his father in that he may be called upon (if he have not been formally discharged from Swedish allegiance) to prove the fact of his own total residence in the United States for five years in addition to the fact and time of his father's naturalization. (Treaty of 1869, Art. 1 and Protocol of May 26, 1869).[24]

It was in a controversy with the Government of Bavaria over the liability to military service of one John Haberacker that the views of the State Department were first set out. Haberacker was born

[24] Mr. Sherman, Secretary of State, to Mr. Grip, Swedish minister, June 15, 1897, 8 MS. Notes to Sweden, 5 Moore, Int. Law Digest 472), reprinted *infra*, Appendix B, p. 77.

in Bavaria but was brought to this country when a minor by his widowed mother, who shortly thereafter married a United States citizen. On a visit to Bavaria Haberacker was arrested as liable to military service. The State Department took the position that upon the marriage of his mother Haberacker "became a naturalized American citizen" (see *United States* v. *Kellar*, 13 Fed. 82 [C. C. S. D. Ill.]) and therefore came within the provisions of the Treaty with Bavaria. In developing the thesis that his mother became a naturalized citizen through her marriage, and that therefore Haberacker became a naturalized citizen under Rev. Stat., Sec. 2172, Secretary Blaine stated:

> A complete answer to the whole contention of the Bavarian Government is that there are only two classes of citizens known in our law, viz, natural-born citizens and naturalized citizens. * * * If, * * * a person is born an alien, there is no way by which he can be made a citizen except by adopting him and clothing him with the privileges of a native citizen, which is naturalization.[25]

[25] Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany, March 19, 1892, For. Rel. 1891, 522, 526 (3 Moore, Int. Law Digest 479, 482); see also Mr. Wharton, Act. Sec. of State, to Mr. Phelps, Min. to Germany, Sept. 8, 1890, For. Rel. 1891, 496 (3 Moore, Int. Law Digest 473), March 26, 1891, For. Rel. 1891, 507 (3 Moore, Int. Law Digest 476).

The affair terminated when John Haberacker deserted from the Bavarian army. The Bavarian Government did not concede the error of its views, which, however, were limited to the contention that under United States law he

In discussing the situation of a minor acquiring United States citizenship through the naturalization of his father, Secretary Hay stated that the State Department gives Rev. Stat. Sec. 2172—

> * * * a quasi conventional interpretation, as will be later shown, by which the acquisition of a parent's citizenship by an alien minor is assimilated to the actual naturalization of the minor himself.
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> * * * * * * * * * It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. * * *
>
> *The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties,* where evidence that a minor child has acquired citizenship through the father, according to

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had not become a citizen, *i. e.*, that *United States* v. *Kellar* was erroneously decided. See notes of Bavarian Government, set out in 3 Moore, Int. Law Digest 475–484. It was apparently conceded that "minor children of persons duly naturalized" would be covered by the treaty. Freiherr von Rotenhan to Mr. Phelps, Dec. 1, 1891, For. Rel. 1891, 521.

> the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to fulfill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law. [Italics supplied.][26]

Shortly afterward, Secretary Hay wrote to Mr. White, Ambassador to Germany, as follows:[27]

> You are instructed once more to present the matter to the German Government, this time along the following lines; By the naturalization of his father while Witzemann was a minor, the latter "became a naturalized citizen of the United States" within the meaning of the naturalization convention between the United States and Wurtemberg. He has also "resided uninterruptedly within the United States five years."
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> That not merely naturalization by formal act of a court was contemplated by the

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[26] Mr. Hay, Secretary of State, to Mr. Harris, min. to Austria-Hungary, January 22, 1900, For. Rel. 1900, p. 13. In the particular case the withholding of a passport from the minor child of an Austrian naturalized in the United States was approved because the minor, having resided in Austria-Hungary prior to and ever since the naturalization of his parent, had not become a United States citizen under Rev. Stat. § 2172.

[27] Instruction of May 15, 1902, No. 1367, 21 Insts. to Germany, p. 434. The particular case, however, concerned one Witzemann who had been born in the United States, and so did not acquire any citizenship by the subsequent naturalization of his father.

framers of the treaty is shown by the protocol signed at the same time, by which it is recognized that citizens of the one state may become legally naturalized in the other state before they have resided there five years. According to the law of the United States (R. S. 2172), the child of an alien who has been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of the naturalization of his parent, shall, if dwelling within the United States, be considered as a citizen thereof. In other words, he "becomes a naturalized citizen of the United States." A minor son of an alien dwelling in the United States is just as effectively "naturalized" by the naturalization of his father as if he were formally admitted to citizenship by the judgment of a court after reaching majority.

Similarly, in the case of the arrest for nonperformance of military service of one Antonio S. Nunes, a minor son of a naturalized American citizen, Secretary of State Knox telegraphed Mr. Bryan, minister to Portugal:

> Inform Portuguese Government without delay this Government holds that persons naturalized under Section 2172 Revised Statutes, come within the provisions of article I, treaty of naturalization, November 14, 1908. Similar construction has been put upon provisions in our naturalization treaties

> with other countries, and it is, therefore, earnestly hoped that Nunes will be released immediately * * *.[28]

Further indication of the significance and effect of these treaties appears in the letter of Mr. Lansing, Secretary of State, to Senator Hitchcock concerning one Angelo Mazzei, who had acquired American citizenship through the naturalization of his father but was being held for military duty in Italy.[29] Mr. Lansing stated:

> The representations of this Government in behalf of naturalized citizens of the United States, born in countries with which the United States had concluded naturalization treaties, have been successful; but otherwise its representations have not been successful.[30]

It is true that in all these instances the minor involved became a citizen of the United States, and that the treaty was being invoked in support of the claim that there had been an expatriation from the foreign country. But unless there are constitutional limitations (see *infra*, p. 63) this does not

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[28] Telegram, January 12, 1910, For. Rel. 1910, 833–834. This protest proved successful and Nunes was released, although the Portuguese Minister for Foreign Affairs reported that there still remained a conflict of laws, and that the naturalization convention did not present a solution "because it does not expressly refer to the children of naturalized persons." For. Rel. 1910, p. 834.

[29] See For. Rel. 1916, 421–422.

[30] Letter, September 8, 1916, For. Rel. 1916, 425, 426.

constitute a true distinction. The naturalization treaties, "contracts between independent nations" (*Santovincenzo* v. *Egan*, 284 U. S. 30, 40), were obviously intended to be reciprocal, and should be so construed.

Although the opinion of the Court of Appeals did not consider either the meaning or effect of the treaty, it did suggest that several opinions of the executive department expressed prior to 1907 indicated that the situation of a minor acquiring derivative citizenship through the naturalization of a parent was governed by the principle of dual allegiance and election. It seems appropriate to point out that none of the cited opinions of the State Department dealt with situations within the purview of any naturalization treaty.[21] The dic-

[21] The following references dealt with the situation of a child born in the United States of alien parents going abroad to the country of his father's origin, involving no naturalization whatever. Mr. Bayard, Secretary of State, to Mr. Liebermann, 160 M. S. Dom. Let. 667, July 9, 1886 (3 Moore, Int. Law Digest 542); Mr. Frelinghuysen, Secretary of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 M. S. Dom. Let. 270 (3 Moore, Int. Law Digest 532); Mr. Blaine, Secretary of State, to Mr. Phelps, Min. to Germany, May 3, 1892, For. Rel. 1892, 189; Mr. Uhl, acting Secretary of State, to Mr. Rudolph, May 22, 1895, 202 M. S. Dom. Let. 298 (3 Moore, Int. Law Digest 534). Note of Mr. Wharton, Act. Sec. of State, to Count Sponneck, Danish Min., Sept. 16, 1890, MS. Notes to Denmark, VII, Vol. 7, p. 224 (3 Moore, Int. Law Digest 715), stated that a native American admitted to Danish citizenship during his minority could still make an election at the age of 21. However, it appears that the minor himself made application

tum in Steinkauler case, 15 Op. A. G. 15, 17, relied on by the court below (R. 37), did not even consider what effect the treaty might have upon the child.[32] It may fairly be said that the considered executive interpretation of the naturalization treaties has been uniform and has construed them to embrace minors acquiring derivative citizenship through the laws of the other signatory nation.

Reference may here be made to the case of Ingrid Therese Tobiassen, 36 Op. A. G. 535. That case concerned Miss Tobiassen, a minor who was born in the United States and whose father, after becoming a citizen of the United States by naturalization, took her to Norway, his native country, where he established and thereafter maintained a permanent residence. Under the Norwegian law, as stated by the Norwegian Foreign Office, the father thus regained his Norwegian citizenship and his daughter acquired Norwegian citizenship together with him. The State Department, rely-

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for Danish citizenship, which was granted by the Danish government, conditional upon the United States' discharging him from American citizenship; Letter, Count Sponneck to Mr. Blaine, Sept. 12, 1890, Notes from Denmark, Vol. VI. Mr. Wharton's letter refused the discharge.

[32] See also Mr. Olney, Secretary of State, to Mr. Materne, May 29, 1896, 210 M. S. Dom. Let. 406 (3 Moore, Int. Law Digest, 542), on the similar fact situation.

That, contrary to the assumptions in these executive opinions, the children concerned did not even acquire German citizenship, see *infra*, note. 47, page 52

ing upon the naturalization treaty between the United States and Norway and Sweden, took the position that Miss Tobiassen had ceased to be an American citizen. Because the Solicitor of the Department of Labor had expressed the opposite conclusion, the Secretary of Labor requested the opinion of the Attorney General. In an opinion which relied upon the similarity of the Norwegian statute to our own statute conferring derivative citizenship upon minors, and which discussed the scope of the treaty-making power although without indicating clearly whether or not the treaty was also relied on, the Attorney General stated that the conclusion of the State Department was correct.

5. This interpretation of the naturalization treaties, as effecting the expatriation of native-born minors naturalized derivatively by the other signatory nation, is also maintained by the judicial authorities. The treaties have been considered to operate to terminate the prior allegiance. An American citizen subject to such a treaty would acquire the status of an alien, and could become a citizen of the United States again only by virtue of a subsequent naturalization in this country. *Reynolds* v. *Haskins*, 8 F. (2d) 473, 475 (C. C. A. 8th). Thus, in the case of Nellie Grant Sartoris, daughter of U. S. Grant, who married in 1874 a British subject and thus became a naturalized British subject and losing her United States citi-

zenship under the naturalization convention with Great Britain, a joint resolution approved May 18, 1898, declared that the widowed Mrs. Sartoris was, on her own application, unconditionally readmitted to citizenship (30 Stat. 1496).

And the treaties have been held to have this effect upon American minors acquiring foreign citizenship derivatively. *United States* v. *Reid,* 73 F. (2d) 153 (C. C. A. 9th), certiorari denied, 299 U. S. 544, because the petition was not filed in time; *Ostby* v. *Salmon,* 177 Minn. 289; *Koppe* v. *Pfefferle,* 188 Minn. 619. In these cases it was held that a native-born American became a naturalized British subject by virtue of the naturalization of the parent in Canada, and therefore lost American citizenship by virtue of the 1870 naturalization treaty with Great Britain.[32] In the *Reid* opinion, the Circuit Court of Appeals for the Ninth Circuit stated (pp. 155–156):

> For the courts of the United States to treat the petitioner as an American citizen instead of a British subject after the naturalization of her father in 1907, would be to expressly violate the terms of the treaty of 1870 with Great Britain, which required her to be treated by the United States "in all

[32] In the *Reid* case the Court held that the minor had lost her citizenship in this fashion and did not come within a statute applying to women who had lost their citizenship by marriage, and facilitating their repatriation. In the Minnesota cases it was held that the persons concerned did not acquire a right to vote upon their return to Minnesota.

respects and for all purposes as a British subject" from and after that date.

* * * * *

It cannot be seriously contended that naturalization of the citizens of the contracting powers is not within the treaty-making power of a nation. * * *

* * * * *

The United States has consistently adhered to the principle that the naturalization of a parent effects the naturalization of a minor child residing with the parent. * * *

* * * * *

The state department has consistently adhered to this view in dealing with foreign governments concerning the rights of minors naturalized in this country by the naturalization of the father, and vice versa. * * *

* * * * *

We think that the purpose of the treaty of 1870 with Great Britain, and of the laws enacted in pursuance thereof by both contracting powers, or implicitly recognized thereby was to do away with all cases of dual citizenship arising from the operation of the naturalization laws of the two contracting powers, and that in the case of petitioner there never was such dual citizenship. * * *

The only contrary judicial construction of a naturalization treaty is that advanced by the District Court in *In re Reid,* 6 F. Supp. 800 (D. Ore.), reversed, 73 F. (2d) 153 (C. C. A. 9th). Apparently the District Court suggested that the treaty did not

operate to terminate rights of citizenship, an interpretation which seems clearly erroneous (see *Reynolds* v. *Haskins*, 8 F. (2d) 473 (C. C. A. 8th)), in view of its purpose to prevent conflict of laws and dual allegiance (*supra*, pp. 20–27). The court also apparently suggested that the treaty permitted the United States to repatriate its nationals, and by permitting a minor to exercise an option at maturity. It suffices to reply that Congress has made no attempt to pass such a repatriation measure, and to assert that although persons like respondent may be entitled to special consideration, that is a matter for the legislature to consider and decide. The principal ground of the District Court opinion is the concept that the citizenship conferred by the Fourteenth Amendment cannot be taken away without the concurrence of the citizen. The considerations applicable to this concept will be considered below in a discussion of the constitutional aspects of the present case (*infra*, p. 53).

B. Act of March 2, 1907

The Government also suggests that, independently of any treaty, respondent was expatriated by virtue of Section 2 of the Act of March 2, 1907, c. 2534, 34 Stat. 1228 (8 U. S. C., Sec. 17). That section provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign State in conform-

> ity with its laws, or when he has taken an oath of allegiance to any foreign State.

Prior to 1907 the concept of what constituted expatriation had been set forth in the different cases as they arose, both by the courts [84] and the Secretaries of State.[85] In the Act of 1907 Congress defined what acts might constitute expatriation.

The Government contends that respondent's acquisition of derivative Swedish citizenship makes her a person who has been "naturalized" under Swedish law (see discussion, *supra*, pp. 19, 29 ff.), and that therefore she has lost her American citizenship under the clear wording of the Act of 1907.

This is the construction apparently accepted by the Congress, as indicated by the Act of June 25, 1938 (Private, No. 751, 75th Cong., 3d Sess.), which authorized the naturalization of one Albin H. Youngquist. This Act provides as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in the administration of the immigration laws Albin H. Youngquist, a native-born citizen of the United States who involuntarily lost his citizenship at the age of five years by reason of the naturalization of his father as a citi-

[84] See H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 159, 168.

[85] 3 Moore, Int. Law Digest, 711–715; cf. H R. Doc. *supra*, p. 210 *et. seq.*

zen of Canada, shall be held and considered to have been legally admitted to the United States for permanent residence.

SEC. 2. Notwithstanding any other provision of law, said Albin H. Youngquist may be naturalized as a citizen of the United States by filing a declaration of intention and taking the oath of allegiance in the manner prescribed in the naturalization laws before any court having jurisdiction of the naturalization of aliens.[36]

This private statute is consistent with expatriation by virtue of the Treaty with Great Britain (*United States* v. *Reid, supra*). However, in the report of the Senate Committee on Immigration which accompanied the bill (Senate Report No. 1613, 75th Cong., 3d Sess.), it was stated (p. 1):

> * * * The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. * * * [37]

[36] A similar private statute was passed in respect of one James Lincoln Hartley (Act of July 13, 1937, c. 493, 50 Stat., pt. 2, p. 1030).

[37] Although the Senate Committee concluded that Youngquist had acquired Canadian citizenship, its report notes that he was denied admission to Canada (possibly because of some action causing loss of Canadian citizenship subsequent to the loss of American citizenship, such as residing for more than one year outside of Canada without appearing before a British diplomatic or Consular officer and satisfying him of a reasonable intention to retain his Canadian domicile. *In re Stamenoff*, 43 F. (2d) 124 (E. D. Mich.)

It may be noted that with respect to expatriation under the 1907 Act by virtue of the taking of an oath of allegiance to a foreign state, it has been held that the oath referred to is one which was taken voluntarily (*United States* v. *Karnuth*, 19 F. Supp. 581, 583 (W. D. N. Y.)), and that such expatriation cannot be effected by one adjudged insane (*McCampbell* v. *McCampbell*, 13 F. Supp. 847 (W. D. Ky.)), or a minor acting on his own behalf (*United States ex rel. Baglino* v. *Day*, 28 F. (2d) 44 (S. D. N. Y.)). But the discountenance of such modes of transfer of allegiance not recognized among civilized nations is not persuasive that expatriation was not intended to take place through a naturalization effected for the minor by a parent, a mode of transfer of allegiance widely accepted (see *infra*, note 51), and with rational foundations.

It may be suggested that to some extent the language of the Act appears to be inconsistent with expatriation of a minor through the act of a parent, since it refers to a citizen "deemed to have expatriated himself." However, the word "deemed" may reasonably be construed to permit of an imputation of the action to the minor himself. Cf. *Leonard* v. *Grant*, 5 Fed. 11, 16 (C. C. D. Ore.).

It may also be noted that the 1906 board inquiring into the laws and practice regarding citizenship, expatriation, and protection abroad recommended a provision assuming the expatriation of an American citizen upon his obtaining naturaliza-

tion in a foreign State as "declaratory legislation." H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 2, 3. None of the cases analyzed by the board appears to have dealt with the problem of a minor acquiring derivative naturalization in a foreign state (*Id.* p. 160 ff, 210 ff). But attention was called to the fact that "Since the statute of 1795 it has been uniformly held that a minor child was naturalized by the naturalization of the father" (p. 33).

Finally, it should be pointed out that the Court of Appeals did not consider the meaning of the statute as such, but first determined that respondent's was a case which had long been decided on the principle that such a person had dual nationality and a right of election upon attaining majority. The court saw nothing in the Act of 1907 to take away this settled right. But, as we shall show below (*infra*, p. 50 *et seq.*), there was no settled doctrine of dual citizenship and election with respect to a minor who had acquired derivative citizenship, and the authorities reviewed by the court were mainly cases of dual citizenship at birth. The only case cited by it which discussed the doctrine of dual allegiance, and arose after 1907, was *United States* v. *Husband*, 6 F. (2d) 957 (C. C. A. 2d), where the discussion was not even dictum, but, rather, by way of speculation.

C. The situation apart from the treaty and statute

The opinion of the Court of Appeals below ignored the Treaty with Sweden, and held that if respondent was naturalized under Swedish law

this merely gave her an additional or double citizenship from which she had made an election of her American citizenship, and that the Act of 1907 did not take away her right to American citizenship.

1. In Citizenship of Ingrid Therese Tobiassen, 36 Op. A. G. 535, discussed *supra*, p. 37, the Attorney General approved the conclusion of the State Department, which he stated to have been predicated upon the treaty (p. 537), and discussed the scope of the treaty-making power (p. 538); yet he finally stated (p. 540) that the claim of the cessation of Miss Tobiassen's citizenship "does not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country," and concluded (p. 540):

> Inasmuch as under our laws a foreign-born minor child obtains a citizenship status through the naturalization of the father, it seems to me inconsistent, to say the least, to deny a like effect to similar laws of Norway.

The opinion thus suggests that, independently of the treaty and of the statute, a person in the position of respondent might cease to be an American citizen in view of the provision of the municipal law of the foreign state, similar to our own naturalization statute, conferring derivative citizenship upon minors.

Such a doctrine of comity would be based upon a parity of reasoning from the United States de-

rivative citizenship statutes. Minors acquiring citizenship through the naturalization of their parents must be treated like all other naturalized citizens. And Congress has provided that "All naturalized citizens of the United States while in foreign countries are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens" (Rev. Stat. Sec. 2000, 8 U. S. C. Sec. 13). With respect to such persons, this Government has taken the position, although its representations have not always been successful, that they are entitled to protection abroad, even in the country of birth, and should be regarded as solely United States citizens.[38]

However, this view would involve the premise that there are modes of expatriation not prescribed by statute or treaty (since we are here assuming for the moment, and solely for purpose of discussion), that, contrary to the position set forth *supra,* pp. 18–45, the Court will regard neither the treaty nor the 1907 act as applicable to respondent. Several problems would be presented. In the first place, it has not been settled whether or not the Act of 1907—taken together with other treaties and statutes prescribing specific modes of expatriation, (such as the statute with respect to desertion or avoidance of a draft, 8 U. S. C., Sec. 11) was

[38] Mr. Lansing, Sec. of State, to Sen. Hitchcock, For. Rel. 1916, 425, 426; Mr. Bayard, Sec. of State, to Mr. McLane, Min. to France, For. Rel. 1888, 510 (see 3 Moore, Int. Law Digest 595, 596); see also 3 Moore, Int. Law Digest at 645.

intended to be exclusive. The lower courts are not in accord on the question."[a] It has not been settled whether the Act of 1868 declaring the right of expatriation may be judicially construed to apply to a person in respondent's status. It has never been settled whether or not the courts or the executive departments may enunciate doctrines prescribing conditions of termination of the citizenship declared by the Constitution when such conditions are not set out in any treaty or statute.

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[a] In *Leong Kwai Yin* v. *United States*, 31 F. (2d) 738 (C. C. A. 9th), the court rejected the suggestion that a person born in Hawaii, of a Chinaman who returned to China with his family, forfeited his citizenship by remaining in China three years after attaining his majority, on the ground that the 1907 Act prescribed the only means for the expatriation of a native-born American.

In *United States* v. *Husband*, 6 F. (2d) 957 (C. C. A. 2d), the court, in dictum, expressed approval of the statement regarding double allegiance and election made by Mr. Bayard, Sec. of State, to Mr. McLane, Min. to France, For. Rel. 1888, I, 510, 511 (3 Moore, Int. Law Digest 548), and raised the question whether a child born in the United States of Italian parents might not, by a "long series of acts," of a kind described, give incontrovertible evidence of an intention to remain an Italian citizen. The court made the suggestion, apparently without respect to the 1907 statute, but one of the "acts" involved was the fact that the person served in the Army and "presumably swore allegiance to the land that claimed his services," citing *Ex parte Griffin*, 237 Fed. 445, a case based on the 1907 Act.

However, in *United States ex rel. Rojak* v. *Marshall*, 34 F. (2d) 219 (W. D. Pa.), the court found, as an alternative ground of decision, that certain acts of a native-born American who had returned to Czechoslovakia with his parents and remained there, effected expatriation, the court holding that Congress had not intended to limit expatriation to cases where a citizen has been naturalized or has taken an oath of allegiance.

2. If this Court should hold the treaty and statute inapplicable, and reject the comity possibility, there might indeed be a case of dual nationality—the United States viewing respondent as having retained her American citizenship, and Sweden viewing her as a Swedish citizen.

But the Government does not suggest even hypothetically an acquiescence in the analysis of the doctrine of election expressed below by the Court of Appeals. That court concluded that the acquisition of Swedish citizenship did not deprive respondent of her American citizenship, stating (R. 37):

> If we concede that under Swedish law appellee became a naturalized Swedish citizen during her minority residence in that country, we should have only what is well known in international law as double citizenship, and whatever effect that status might have on appellee's right to call on the United States for protection while she remained abroad, it would not affect her right of election when she reached her majority to claim and resume her American citizenship and return to the United States.

The Court of Appeals apparently viewed the doctrines of dual allegiance and election in a situation like the one at bar as traditional and well accepted. It appears, indeed, to have proceeded largely on the view that under the settled law respondent had a right of election, and to have found nothing in the Act of 1907 attempting to take away that right.

In the first place, if a doctrine of election resolving questions of dual nationality is applied as a test of citizenship, then it is a doctrine prescribing grounds of expatriation. There is no statute of the United States establishing a doctrine of election as a test of citizenship, although with respect to children of citizens born outside the United States it is made a condition of diplomatic protection.[40] The principle of election, at least as applied to persons born with dual nationality, has been recognized by the Secretaries of State, but their statements relate generally not to questions of nationality as matter of strict law but to the right of protection abroad.[41] It is true that there are judicial dicta recognizing the doctrine of election. See *Inglis* v. *Trustees of Sailor's Snug Harbor,* 3 Pet. 99, 126.[42] But if it is true that the Act of 1907, together with other statutes and treaties, prescribes the exclusive modes of expatriation,[43] then no doctrine of "election" can operate to deprive even a person of dual nationality of his American citizenship.

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[40] R. S. Sec. 1993, 8 U. S. C. Sec. 6. Such children are required upon reaching the age of eighteen, to record their intention to become residents and citizens of the United States, and, upon attaining their majority, to take the oath of allegiance to the United States.

[41] See R. W. Flournoy, Jr., *Dual Nationality and Election* (1921), 30 Yale L. J. 545, 559, 563.

[42] See also cases gathered in Flournoy, *supra*, 30 Yale L. J. at 697–701; H. R. Doc. No. 326, 59th Cong., 2d Sess., pp. 74–76.

[43] See *supra*, note 39, p. 47.

Moreover, even to the extent that any doctrine of election has been long applied, as the authorities cited by the court below indicate, the doctrine has hitherto received its main application in cases of double allegiance *at birth*, involving persons born in one country, and acquiring its nationality by the *jus soli* of Anglo-American jurisprudence, yet born of parents having the nationality of another country and acquiring the nationality of that country by the *jus sanguinis* of Continental jurisprudence.[44]

The discussions of dual citizenship and election cited by the court below related either to persons born in the United States of alien parents,[45] or per-

[44] The possibility of such dual nationality is easily appreciated in view of the laws of our own country, which not only adopt the rule that citizenship derives from birth within the United States (*jus soli*), but also declare to be citizens children born outside the United States at a time when their fathers are citizens of the United States (8 U. S. C. Sec. 6).

[45] *United States* v. *Husband*, 6 F. (2d) 957, 958 (C. C. A. 2d); *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 514, 65 Atl. 657; cf. *United States* v. *Wong Kim Ark*, 169 U. S. 649. *United States* v. *Day*, 28 F. (2d) 44 (S. D. N. Y.) did not involve, so far as appears from the report, a case of dual citizenship. The following references dealt with the situation of a child born in the United States of alien parents going abroad to the country of his father's origin, involving no naturalization whatever. Mr. Bayard, Secretary of State, to Mr. Liebermann, 160 MS. Dom. Let. 667, July 9, 1886 (3 Moore, Int. Law Digest 542); Mr. Frelinghuysen, Sec. of State, to Mr. O'Neill, M. C., Aug. 8, 1882, 143 MS. Dom. Let. 270 (3 Moore, Int. Law Digest 532); Mr. Blaine, Sec. of State, to Mr. Phelps, Min. to Germany May 3, 1892, For. Rel. 1892, 189; Mr. Uhl, acting Sec. of State, to Mr. Rudolph, May 22, 1895, 202 MS. Dom. Let. 298 (3 Moore, Int. Law Digest 534).

sons born in another country of an American father."

It is true that Steinkauler's case, 15 Op. A. G. 15, indicates that prior to the Act of March 2, 1907, there was a willingness to apply the doctrine of dual citizenship and election in the case of a minor born with single citizenship. But this opinion, as well as being a dictum in view of its recommendation that diplomatic protection be withheld, seems to have erred in its assumption that the minor acquired another nationality."

There is, indeed, one authority, not cited by the court below, which stated that a person born in the United States and admitted to Danish citizenship during his minority would still have the right, upon attaining his majority, to elect to become an Amer-

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[46] *State ex rel. Phelps* v. *Jackson*, 79 Vt. 504, 520, 65 Atl. 657.

[47] Attorney General Pierrepont stated that, under the Treaty, and in harmony with American doctrine, it is clear that the return to Germany of a German naturalized in the United States with his son born in the United States would make the father a German subject again and invest the son with German nationality. This appears also to have been the view taken by Mr. Olney, Sec. of State, to Mr. Materne, May 29, 1896, 210 MS. Dom. Let. 406 (3 Moore Int. Law Digest 542). However, it appears that although a naturalized German, who by permanent return to Germany renounced his naturalization under Article IV of the Treaty (substantially the same as Article III of the Protocol to the Convention with Sweden, *infra*, p. 73), nevertheless under the German municipal law he did not resume his German nationality. As for the sons born in the United States, returning with the father, the German Government had no hesitation in recognizing them solely as American citizens. See diplomatic correspondence between United States and Germany, set out in 3 Moore, Int. Law Digest 749–751.

ican citizen."[48] It appears, however, that the minor himself made application for the Danish citizenship."[49]

In the present case it may be conceded that if this Court finds that a person situated as is the respondent can have a dual citizenship, and that respondent had American citizenship as well as Swedish citizenship, despite the provisions of the treaty and the Act of 1907, nothing done by her operated to deprive her of her American citizenship.

III. NEITHER THE TREATY NOR THE STATUTE, SO CONSTRUED, IS UNCONSTITUTIONAL

If this Court should hold that the treaty, or the statute, or both, involved an intent to expatriate a person situated as is the respondent, there still remains the question whether the Constitution provides a bar to such expatriation. There are suggestions, both in the opinion of the Court of Appeals below (R. 38), and of the District Court in *United States* v. *Reid,* 6 F. Supp. 800 (D. Ore.), reversed, 73 F. (2d) 153 (C. C. A. 9th), that respondent's rights as a citizen cannot be lost except by her own voluntary act done after attaining her majority. This claim is bottomed upon the first sentence of Section 1 of the Fourteenth Amendment, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdic-

[48] Mr. Wharton, Act. Sec. of State, to Count Sponneck, Danish Min., Sept. 16, 1890, MS. Notes to Denmark, VII, 224 (3 Moore, Int. Law Digest 715).

[49] See *supra*, note 31, p. 36.

tion thereof, are citizens of the United States and of the State wherein they reside.

It is proposed first to show that the Act of 1907, if construed to expatriate respondent, does not violate the Constitution, and then to demonstrate that the Treaty, similarly construed, is similarly valid.

A. The Fourteenth Amendment and the Act of 1907

Particular reliance is placed upon certain dicta found in the opinion of the Court in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703, 704:

> The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away. * * * The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship.
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> * * * * * * *
>
> * * * No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; * * *. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful.

Although the Fourteenth Amendment declares that birth in the United States gives rise to citizenship, and although the Amendment may not confer

upon Congress any authority to restrict the effect of such birth, yet it is abundantly plain that the citizenship guaranteed by the Fourteenth Amendment may be taken away by Congress because of occurrences subsequent to such birth. In other words, Congress has the power to enact expatriation measures prescribing how citizenship may be lost. Thus, in *Mackenzie* v. *Hare*, 239 U. S. 299, this Court upheld the constitutionality of a statute providing for the expatriation of American women marrying foreigners. The Court stated that, although there was no express gift of this power, "there may be powers implied, necessary or incidental to the expressed powers. As a government, the United States is invested with all the attributes of sovereignty" (p. 311).

Apparently, the more limited contention of unconstitutionality is, not that Congress has no power to prescribe the conditions of expatriation, but that under the Fourteenth Amendment it has no power to provide for expatriation except upon the voluntary act of the citizen.

We submit in reply that the power to expatriate does not necessarily depend upon a voluntary act of the citizen but exists whenever it is reasonable in the circumstances, and, further, that although generally it might be unreasonable to provide for expatriation where the citizen had not done a voluntary act, especially in the case of an adult, nevertheless in matters of nationality, as in other matters

generally requiring voluntary action, it is reasonable to control the status of the minor child by the act of the father.

First, it is significant that the Fourteenth Amendment was adopted as a restriction not on the power of Congress but rather on the powers of the States. Indeed, the power of Congress was expanded by the Amendment, since the fifth section thereof provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The provision invoked by respondent gave permanence to a rule of citizenship *jure soli*, and to explore its meaning in that regard, recourse may be had to the common law. *United States* v. *Wong Kim Ark*, 169 U. S. at 654. But we submit that the Amendment, not aimed at the national government, does not have the effect of setting doctrinaire restrictions preventing the Congress from acting as a member of the community of nations and prescribing reasonable provisions, adopted in many other countries, with respect to the expatriation of citizens.

Respondent may suggest that the opinion in *Mackenzie* v. *Hare, supra*, itself stated (p. 311):

> It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen.

But although that opinion relied on the fact that the condition of expatriation, marriage to an alien,

had been "voluntarily entered into," it is important to remember that the person involved in that case was an adult. We think the ultimate and inclusive basis of decision was the statement made of the statute there involved (p. 312): "This is no arbitrary exercise of government."

Other considerations were developed in the course of that opinion which abundantly demonstrate the validity of the Act of 1907, if construed to expatriate respondent. The Court said (p. 311, 312):

> The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection. There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interests, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband. It has purpose, if not necessity, in purely domestic policy; it has greater purpose and, it may be, necessity, in international policy. And this was the dictate of the act in controversy. Having this purpose, has it not the sanction of power?
>
> Plaintiff contends, as we have seen, that it has not, and bases her contention upon the absence of an express gift of power. But there may be powers implied, necessary or incidental to the expressed powers. As a

> government, the United States is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries. We should hesitate long before limiting or embarrassing such powers. * * * The marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. * * *

Paraphrasing these words with respect to the present question, it may be said that the unity of the family, whereby the father acts for the child, is an ancient principle of our jurisprudence, that it is neither accidental nor arbitrary and works in many instances for the child's protection, and that Congress could reasonably have been persuaded of the wisdom, in both domestic policy and international policy, of the insistence on such family unity in matters of nationality and citizenship.

Historical analogy in domestic law may be found in the doctrine of domicil. A change of domicil can normally be effected only by voluntary action and formation of an intention to reside, but in the case of minors the rule is that an infant cannot change his own domicil and that his domicil follows the independent domicil of the head of the

household, his father, or his widowed mother. *Lamar* v. *Micou*, 112 U. S. 452, 470.

The principle of the unity of the family appears with respect to the specific question of nationality. In the common law countries "it has always and consistently been held that the wife and minor children take the nationality of the husband and father." *In re Page*, 12 F. (2d) 135 (S. D. Calif.). The cogency of the considerations involved in the doctrine *jure sanguinis* has thus been recognized and that doctrine applied in addition to the *jus soli* (see *supra*, p. 51, n. 44).

The most significant recognition of the principle of the unity of the family appears in our naturalization statutes. Naturalization of an adult, involving a transfer of allegiance, requires voluntary action on the part of the individual. Our domestic statutes require an application to be filed by the one to be naturalized. Similarly as a matter of international law, except perhaps in case of a collective naturalization or naturalization by conquest or treaty, naturalization is regarded as a consequence which can be attached only to the voluntary and intelligent action of the person being naturalized. 3 *Moore*, Int. Law Digest 302–311; *Hall*, International Law (8th ed.) 267. Yet ever since 1790 Congress has provided that the naturalization of a father shall confer American citizenship on his children if dwelling within the United States (see *supra*, p. 19). In the words of Judge [later Mr.

Justice] Brown, applicable as well to the subject of expatriation as to that of naturalization:

> It will be noticed that legislation upon the subject of naturalization is constantly advancing towards the idea that the husband, as the head of the family, is to be considered its political representative, at least for the purposes of citizenship, and that the wife and minor children owe their allegiance to the same sovereign power.[50] [*Pequignot* v. *City of Detroit*, 16 Fed. 211, 216 (C. C. E. D. Mich.).]

Considerations of domestic policy for binding the child by the acts of his father suggest cognate consideration of international policy. It may be appropriate to note the large number of states (in the international law sense) which provide that minor children are naturalized through the natur-

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[50] The recent Draft Convention on Nationality, prepared in 1929 by the Research in International Law of the Harvard Law School in anticipation of the first Conference on the Codification of International Law, The Hague, 1930, provided that "a state [in the international law sense] may not naturalize a person of full age who is a national of another state without the consent of such person; but a state may naturalize a person not of full age, in connection with its naturalization of his paren without the consent of such person" (Article 15). See 23 Am. J. Int. Law, Sp. Supp. (1929) 53.

The comment states, p. 54: "The propriety of naturalizing minor children through the naturalization of their parents arises from the principle of the unity of the family and the headship of the father or of the widowed mother. Such naturalization is provided for in the laws of many states."

alization of the father.[51] And more than twenty countries provide for expatriation in the case of a minor who acquires a new nationality in a foreign country by virtue of his parent's naturalization.[52] We submit that the Fourteenth Amendment does not deny to Congress the power to enact such reasonable legislation in the adjustment of its international policy.

The only authorities which even suggest that the power should be denied are the *dicta* in the *Wong Kim Ark* case, which quotes from *Osborn* v. *United States Bank*, 9 Wheat. 738, 827, and in *Ex parte Chin King*, 35 Fed. 354 (D. Ore.). These *dicta* must be read in the light of the considerations elaborated in *Mackenzie* v. *Hare, supra*. The early state judicial declarations provide no adequate basis for a ruling denying the power claimed. In *Burkett* v. *McCarty*, 73 Ky. (10 Bush) 758, 759, it was said that "no mere act of state legislation can *per se* denationalize him against his will or without his concurrence." But this vindication of state, not national, citizenship, was concerned not with a consideration of the status of a minor child, but

[51] Research in International Law, Harvard Law School, Draft on Nationality, 23 Am. J. Int. Law (1929), Sp. Supp., pp. 95–98. More than forty states are listed. An additional twenty provide for such naturalization, but give the person an option to renounce citizenship upon attaining his majority.

[52] Id., p. 105.

with an adult expatriated by way of punishment and without judicial trial. And the statement in *Ainslie* v. *Martin*, 9 Mass. 454, 460, that the sovereign cannot discharge a subject "from his allegiance against his consent" except by disfranchisement "as a punishment for some crime" is tendered in a general discussion by way of corollary to the early, now discarded, rule that no subject can expatriate himself.

Finally, it should be noted that the dictum in the *Wong Kim Ark* opinion, to the effect that Congress cannot modify the effect of birth upon citizenship, cannot be stretched to give respondent, a citizen by birth, immunity against the Congressional expatriation here involved, without giving the same immunity to a naturalized citizen. Although a person cannot be naturalized except under an Act of Congress, once he is naturalized he "becomes a member of the society, possessing all the rights of a native citizen" (see *Osborn* v. *United States Bank*, 9 Wheat. 738, 827), except eligibility for the Presidency. And the Fourteenth Amendment provides that all persons "born or naturalized in the United States" are citizens thereof. Obvious considerations might suggest the expatriation of a minor grown up in a foreign land who, after acquiring derivative citizenship here, returns to his native country with a father who renounces his allegiance to the United States and resumes his original nationality. We submit that Congress should not be held without the power to effect expatriation in such a case.

B. The Convention with Sweden

1. We submit that it is plain that the Treaty with Sweden and the other naturalization treaties entered into by the United States deal with a general subject, within the province of the treaty-making power, namely, expatriation, and the recognition of naturalization by another power.

"The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations" (*Santovincenzo* v. *Egan*, 284 U. S. 30, 40), extending "to all proper subjects of negotiation with foreign governments" (*In re Ross*, 140 U. S. 453, 463; *Asakura* v. *Seattle*, 265 U. S. 332, 341). It seems clear that expatriation of nationals who become attached to the allegiance of another government is a subject properly pertaining to our foreign relations. Indeed, it is a subject which has been found included within the implied powers of Congress, in the absence of constitutional grant, precisely because the United States, having "the character of nationality * * * has the powers of nationality, especially those which concern its relations and intercourse with other countries." *Mackenzie* v. *Hare*, *supra*, 239 U. S. at 311.

The treaty with Sweden, avoiding conflicts between the two nations over the nationality and allegiance of the persons embraced thereby, serves the most important purpose of a convention, removing strain and strengthening "friendly relations between the two nations." *Asakura* v. *Seattle*, 265 U. S. at 341.

The propriety of making treaties upon the subject of expatriation is reenforced by the fact that such conventions are numerous (cf. *Asakura* v. *Seattle*, *supra*, 341) and of long standing, and that new ones have been entered into in recent years. Seventy years ago the United States concluded nine naturalization treaties, including the one with Norway and Sweden (see *infra*, pp. 24–25, n. 16, 17). Since then the United States has signed a multipartite pact and has concluded twelve other bipartite naturalization treaties, the most recent one, with Albania, having become effective July 22, 1935.[53] Other countries, too, have signed such conventions.[54] As President Harrison said in his annual message to Congress in 1899, proposing new naturalization treaties:

> The appropriateness of special conventions for that purpose is recognized in treaties which this government has concluded with a number of European states, * * *.[55]

2. There remains the question whether, assuming that expatriation generally is a subject ap-

[53] See *supra*, note 18, p. 25.

[54] See Flournoy and Hudson, Nationality Laws, p. 676 (Argentina-Sweden and Norway, July 17, 1885); p. 680 (Japan-Spain, January 2, 1897); p. 682 (Great Britain-Haiti, April 6, 1906). In the Treaty signed at Versailles, June 28, 1919, and the Treaty signed at St. Germaine en Laye, September 10, 1919, Germany and Austria, respectively, undertook to recognize any new nationality which had been or might be acquired by her nationals under the naturalization laws of the allied and associated powers. Flournoy and Hudson, supra, pp. 646, 647.

[55] Foreign Relations, 1889, p. IX, quoted *supra*, p. 27.

propriately treated in a convention, nevertheless the Constitution forbids the application of an article providing for the expatriation of minor children because of the naturalization abroad of their parent.

The opinion suggesting most emphatically the possible limitations on the treaty-making power is that in *Geofroy* v. *Riggs*, 133 U. S. 258, where Mr. Justice Field said (p. 267):

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country. * * *

See also *The Cherokee Tobacco*, 11 Wall. 616, 620; *Asakura* v. *Seattle*, 265 U. S. 332, 341.

The present treaty does not come within any of the specific interdictions stated in this opinion. Nor does it attempt to authorize "what the Constitution forbids." Nothing in the language of the Fourteenth Amendment contains any prohibition

upon the power to prescribe conditions of expatriation. To paraphrase the opinion in *Missouri* v. *Holland*, 252 U. S. 416, 433, 434, the treaty "does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms" of the Fourteenth Amendment.

We submit that, whatever the limitations imposed by the Fourteenth Amendment upon the power of Congress, the declaration of the citizenship attaching at birth does not emit an "invisible radiation" nullifying a treaty prescribing that such citizenship may be lost by a minor naturalized derivatively in a foreign land. The implication of constitutional limitations upon government may not be freely indulged in the case of treaties made under the authority of the United States, pledging its solemn word as a High Contracting Party. "If the court possess a power to declare treaties void, I shall never exercise it, but in a very clear case indeed," said Mr. Justice Chase in *Ware* v. *Hylton*, 3 Dall. 199, 237.

The Fourteenth Amendment and the earliest naturalization treaties were practically contemporaneous. The treaty negotiated with the North German Union was signed at Berlin on February 22, 1868. Other treaties were signed in May and July (*supra*, p. 25). In the Congressional debates which preceded the adoption of the Act of July 27, 1868, *supra*, laudatory references to these treaties frequently occurred, and, indeed, the conclusion of these treaties facilitated the passage of the legisla-

tion."[36] Subsequent to the negotiation of the first Bancroft treaty, the Fourteenth Amendment, which had been proposed in 1866, was ratified by five states,[37] and in July 1868, the Fourteenth Amendment was declared ratified. Shortly thereafter there was ratified the Treaty with Bavaria, September 18, 1868, and the other naturalization treaties. It can hardly be supposed that it was ever contemplated that virtually contemporaneous documents were inconsistent with each other or that the treaties, with words appropriate to the coverage of naturalization of minors, were invalid *pro tanto*. And in recent years the United States has negotiated and ratified treaties, with Bulgaria, Czechoslovakia and Albania, specifically applicable to minors acquiring derivative citizenship (see *supra*, p. 28).

Moreover, we maintain that the Fourteenth Amendment, properly construed, embodies a guaranty, not against "involuntary" expatriation in all cases but against "unreasonable" expatriation, and not against the expatriation of a minor by the act of his father. For sake of brevity, further elaboration of this argument is not presented here again, but the Court is referred to the discussion, *supra*, pp. 54–62, which, showing that the Fourteenth Amendment does not bar Congress from expatriat-

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[36] See *Moore*, American Diplomacy, p. 188.

[37] See U. S. C. A. Annotations to Fourteenth Amendment, p. 4: Iowa, April 3, 1868; Arkansas, April 6, 1868; Florida, June 9, 1868; Louisiana, July 9, 1868; Alabama, July 13, 1868.

ing respondent, likewise demonstrates that the Amendment does not prevent full effect from being given to the treaty.

3. Since the Treaty with Sweden does not contravene any of the restraints which have been implied on the treaty-making power, it is unnecessary to consider whether, in view of the wording of Article VI, clause 2, of the Constitution, a treaty complying with the formal requirements of adoption, can be subject to constitutional attack." Cf. *Ware* v. *Hylton, supra.* It may be noted that no treaty has ever been declared unconstitutional.

CONCLUSION

The respondent, although formerly a citizen of the United States, must be regarded as having been expatriated under the treaty with Sweden, and also under Section 2 of the Act of March 2, 1907, as a result of her naturalization in Sweden through her

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" Article VI, clause 2, of the Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; * * *."

Cf. *Missouri* v. *Holland*, 252 U. S. 416, 433:

"Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. * * *"

father's naturalization, so that she is now illegally residing in the United States. It is beyond the power of the executive or judicial branch of the Government to establish a special rule of law under which persons situated as she is may readily reacquire citizenship. Under the Constitution, this is distinctly a function of the Congress.

For the reasons herein stated it is respectfully submitted that the decision of the Court of Appeals for the District of Columbia should be reversed and the respondent be ordered deported.

ROBERT H. JACKSON,
Solicitor General.

BRIEN MCMAHON,
Assistant Attorney General.

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GERARD D. REILLY,
Solicitor, Department of Labor.

JANUARY 1939.

APPENDIX A

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution as pertinent provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

Act of April 14, 1802, c. 28, Sec. 4, 2 Stat. 153, as pertinent provides:

> *And be it further enacted,* That the children of persons duly naturalized under any of the laws of the United States * * * being under the age of twenty-one years, at the time of their parents being so naturalized * * * shall, if dwelling in the United States, be considered as citizens of the United States * * *.

This Act which is the basis of the present statute (U. S. C., Title 8, Sec. 7), repealed the Act of January 29, 1795, c. 20, 1 Stat. 414, 415, which in turn repealed the Act of March 26, 1790, c. 3, 1 Stat. 103, containing similar derivative citizenship provisions.

Act of March 2, 1907, c. 2534, Sec. 2, 34 Stat. 1228 (U. S. C., Title 8, Sec. 17), provides:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war.

Articles I and III of the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 809–810), provides:

ART. I

Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the govern-

ment of Sweden and Norway to be American citizens, and shall be treated as such. * * *

ART. III

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Articles I and III of the Protocol to the Convention between the United States of America and Sweden and Norway. Naturalization. Signed May 26, 1869; Ratified December 17, 1870; Exchanged June 14, 1871; Proclaimed January 12, 1872 (17 Stat. 811-13), provides:

I. Relating to the first article of the convention

It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

* * * * *

III. Relating to the third article of the convention

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

The Swedish Law on the Acquisition of Citizenship, dated October 1, 1894, as amended May 7, 1909, is here set out as it appears in the two following books:

Consular Statute Book of Sweden (1910)[1], pp. 1–3.

Law on the Acquisition and Loss of citizenship, dated the 1st of October, 1894.

Art. 1. Swedish citizenship belongs by right of birth to any legitimate child whose father is a Swedish citizen.

* * * * *

Art. 4. Swedish citizenship can moreover be acquired by naturalization in the manner, and on the conditions prescribed by a special Law.

Unless otherwise decided at the time, the naturalization of a foreigner gives Swedish citizenship to his wife and legitimate children under age.

[1] Published Stockholm Kungl. Boktryckeriet. P. A. Norstedt & Soner. 100504.

Art. 5. Swedish citizenship is forfeited by any one who becomes a citizen of another country.

* * * * *

Art. 8. Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.

If the King has entered into a convention with a foreign Government that any person previously of Swedish nationality having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him. *Law of the 7th of May 1909.**

* This Law shall come into force immediately after publication. Any person previously of Swedish nationality who is then domiciled in this Country, and on account of a convention referred in Art. 8, second part, has lost his foreign citizenship, shall regain Swedish citizenship when this Law comes into operation. If Swedish right of citizenship is

Statute Book for Legations and Consulates (1931), pp. 23, 27:

Law of 1 October 1894 Respecting the Acquisition and the Loss of Swedish Citizenship

* * * * *

ART. 8. A person who has forfeited Swedish citizenship as a consequence of the provisions contained in Art. 7 and has not become a citizen of some other country, shall recover Swedish citizenship if he (or she) becomes resident in Sweden or if the King accords sanction to his (or her) recovery of citizenship without the acquiring of residence in Sweden.

With regard to the cases where between Sweden and some foreign State an Agreement has been arrived at, which prescribes that a person who has been a Swedish citizen and has acquired citizenship in the said foreign country shall be deemed to have relinquished the latter after he (or she) has become resident again in Sweden and has resided in Sweden for some length of time, any person who forfeits his (or her) alien citizenship on the said ground shall at the same time recover Swedish citizenship.

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thus regained by the husband and father, such right also accrues to his wife and legitimate children under age, provided they are domiciled in this Country when the Law comes into force, or if they, together with the husband and father, have lost their citizenship in the foreign country. As regards citizenship an illegitimate child follows its mother in cases where, according to the provisions in the preceding clause, a legitimate child follows its father. [Note: this footnote is quoted, together with the rest of the law, from the volume indicated.]

[2] Published Stockholm Kungl. Boktryckeriet. P. A. Norstedt & Soner. 273185.

If Swedish citizenship is recovered by a husband according to the above provisions of this Article, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, unless, in the case mentioned in the second sentence, they are not resident in Sweden at the time when the husband-father recovers Swedish citizenship, or have not lost along with him citizenship in the foreign country. *Law of 7 May 1909.* In that Law there were also the following enactments:

This Law shall come into force immediately after it has been promulgated. Anyone who was previously a Swedish citizen and is at the time resident in Sweden and who, in accordance with such an Agreement as is in view in the second sentence of Art. 8, has lost his (or her) alien citizenship, shall recover Swedish citizenship on the coming into force of this Law. If Swedish citizenship is recovered by a husband in that way, Swedish citizenship shall also accrue to his wife and to his legitimate children who are under age, provided they are either resident in Sweden when the Law comes into force or have lost citizenship in the foreign country along with the husband-father. Illegitimate children adhere to their mother in respect to citizenship in those cases where, pursuant to the provision in the preceding sentence, legitimate children adhere to their father.

APPENDIX B

No. 104 DEPARTMENT OF STATE,
Washington, June 15, 1897.

Mr. A. GRIP,
&c, &c, &c.

SIR: I have the honor to acknowledge the receipt of your note of the 8th instant, in which, under instructions from your Government and having particular regard to the case of one Atle Burman, a young man of 23 years, born in Sweden, and since 1893 residing in Sweden, who claims to be a citizen of the United States through the naturalization of his father, you propound certain inquiries concerning the general status of minor children of an alien who becomes a citizen of the United States.

The case to which you advert and the particulars of which, you give, has not yet been reported to this Department by the United States Legation at Stockholm. However, the application of Atle Burman, upon which the United States Minister at Stockholm granted him a passport, December 11, 1895, is on file in this Department. It appears therefrom that he came to the United States in 1881; that he resided uninterruptedly in this country until May 20, 1893; and that his father was naturalized here on April 19, 1889, at which time he, the son, was less than fifteen years of age.

You ask "When a foreigner is naturalized as an American citizen, what influence has such naturalization on the nationality of his minor children,

whether they accompany their father or remain in his native country?"

This inquiry is met by Section 2172 of the Revised Statutes, which reads as to its pertinent features:

"The children of persons who have been duly naturalized under any law of the United States, * * * being under the age of twenty-one years at the time of the naturalization of the parents, shall, if dwelling in the United States, be considered as citizens thereof; * * *."

Your second inquiry runs thus: "What is the effect of a person's return to his native country on his rights as an American citizen acquired through the naturalization of his father?"

The acquisition of United States citizenship by an alien-born minor through the lawful naturalization of his father under the operation of Section 2172, Revised Statutes, above quoted, is in its effects upon the individual as much an act of naturalization as is the admission of the father to citizenship by a decree of a competent court. Consequently this Government holds that a minor so naturalized is entitled to all the benefits of a naturalization treaty with the country of his origin, his case differing only from that of his father in that he may be called upon (if he have not been formally discharged from Swedish allegiance) to prove the fact of his own total residence in the United States for five years in addition to the fact and time of his father's naturalization. (Treaty of 1869, Art. I and Protocol of May 26, 1869.) If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his

original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper. (Treaty of 1869, Article III.) Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship. (Protocol, May 26, 1869.) But this presumption, like all presumptions of intent, may be rebutted by proof. Until a person so circumstanced shall be held to have voluntarily abandoned his American citizenship, or shall have acquired another citizenship upon application to that end and by due process of law, this Government is entitled to claim his allegiance and constrained to protect him as a citizen so long as he shall be found bona fide entitled thereto.

Atle Burman's father having been duly naturalized in the United States while the son was a minor dwelling in this country, the latter became a citizen of the United States under the Statute. The facts of the case, as known to the Department, seem to clearly negative the presumption that Burman has abandoned his American citizenship. He holds an American passport, and in his application he declared; under oath, his intention to return to the United States during the present year to reside.

Accept, &c.

JOHN SHERMAN.

U. S. GOVERNMENT PRINTING OFFICE: 1939

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM ON BEHALF OF PETITIONERS

A. During the course of the argument of the above-entitled cause on February 3, 1939, a request was made by the Court to be advised of the positions previously taken by the executive branch of the Government with respect to the questions involved in this case.

1. In particular the Court requested a copy of the letter of Mr. Wilbur J. Carr, Assistant Secretary of State, to the Attorney General, dated October 7, 1931, concerning the case of Ingrid Therese Tobiassen.

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The only relevant part of that letter, stating the uniform construction by the Department of State of Section 2 of the Act of March 2, 1907, and of the naturalization treaties, has been quoted in petitioners' Reply Brief, pp. 2–3. The entire letter is set forth, *infra*, Appendix A. As the letter shows, it was accompanied by two enclosures, which are also set forth, *infra*, Appendix A. One of these, an excerpt from a Department of State memorandum of August 17, 1926, concerning the case of one Baldura Schmidt, also discusses some of the State Department authorities interpreting the naturalization treaties as applicable to the expatriation of a minor acquiring derivative citizenship through the act of a parent (see original Brief for the Petitioners, pp. 29–35).

2. This letter is significant because it again indicates that, contrary to the contention of respondent Elg (Br. 42–45), the statement in Attorney General Mitchell's opinion in the *Tobiassen* case, that Miss Tobiassen had acquired Norwegian nationality upon going to Norway with her father, was not hasty or ill-considered. The communication of the Department of State of October 7, 1931, shows, in its last paragraph (*infra*, Appendix A) that the legation at Oslo was instructed to ascertain from the Norwegian authorities whether Miss Tobiassen was regarded as a naturalized Norwegian subject. In his opinion, the Attorney General recited this fact and also the fact that the Norwegian Foreign

Office had informed the American Legation that Miss Tobiassen acquired Norwegian citizenship if she were living with her father when he took up his residence in Norway, under the Norwegian law of April 21, 1888 (see 36 Op. A. G. at 536, 537). As indicated in the Government's original Brief for the Petitioners, pp. 37–38, Attorney General Mitchell's opinion relies upon this statement by the Norwegian Foreign Office.

3. In the present case, a similar inquiry was made of the Swedish Foreign Office. The letter of R. B. Shipley, Chief of Passport Division, to Miss Elg, referred to a communication of October 30, 1934, from the Swedish Ministry for Foreign Affairs to the American Legation at Stockholm, holding that Mr. Elg recovered Swedish nationality by resuming his residence in Sweden and remaining there for two years, and that if Miss Elg were residing with him she also acquired Swedish nationality under Swedish law (see R. 17). This is diplomatic correspondence which may come within the intent of the Court's request, and it is accordingly printed *infra*, Appendix B. A certified copy, and the letter of transmittal from the State Department, is being filed with the Clerk of this Court.

4. In order fully to inform the Court of the positions taken by the executive departments of the Government, there is set forth in Appendix C, *infra*, the communication of the Department of Labor dated August 11, 1931, requesting the opin-

ion of the Attorney General in the *Tobiassen* case, and enclosing a memorandum of that date signed by the Solicitor of the Department of Labor, expressing the view that Miss Tobiassen had not lost her American citizenship.

Inquiry was made of the Department of Labor as to its administrative practice with respect to persons situated as is respondent, Miss Elg. Accompanying a letter dated February 7, 1939, from Mr. Gerard D. Reilly, Solicitor of Labor, for the Secretary of Labor, to the Solicitor General, is a memorandum by Mr. T. B. Shoemaker, Deputy Commissioner of Immigration and Naturalization, indicating that, prior to the opinion of the Attorney General in the Tobiassen case, the administrative view of the Department of Labor was to regard persons like respondent as American citizens. This memorandum is printed infra, Appendix D. In the original Brief for the Petitioners (p. 38), attention was called to the difference of opinion between the Labor Department and State Department which was resolved by the Attorney General.

B. The Government takes this opportunity to respond to the contention disclosed upon the reply argument of plaintiff Elg and based upon a "note" to Article 8 of the Swedish Law of October 1, 1894. For the sake of convenience that "note" is reprinted *infra*, Appendix E. The "note" is not part of the law, but is merely a general annotation

contained in one volume.[1] It states that the Article "as is clear from its wording, only bore application in the case of a person who had been a Swedish citizen." Obviously, this reference is merely to *the principal coverage of the Article, under the first and second paragraphs,* avoiding the statelessness of a person resident in Sweden "who has forfeited Swedish citizenship." The note was not intended to suggest that if such a person did recover his former Swedish citizenship under Article 8, his minor children became Swedish citizens only if they, too, had formerly been Swedish citizens. Nothing in the clear wording of Article 8 suggests such a construction. This construction would mean that minor children born abroad without Swedish nationality would be left stateless if they were expatriated by their country of birth when they were brought to Sweden by their parents.

C. Mr. Justice Stone inquired whether the Treaty with Sweden could have the effect of expatriating respondent Elg, born with sole United States citizenship, in view of the limitation in Article III to citizens of one state who become recognized citizens of another state and then return to their original country. A full answer to the question involves consideration of the interrelation of the various treaty provisions.

[1] It is not contained in the volume of laws published in 1910, "Consular Statute Book of Sweden," but contained only in "Statute Book for Legations and Consulates" published in 1931, after the law had ceased to be operative (January 1, 1925).

The Treaty with Sweden, like all the other naturalization treaties, contains a crucial provision recognizing the doctrine of expatriation, the conflict over which had previously led to international disputes. That provision is Article I of the Convention with Sweden, and provides that citizens of one state who become citizens of the other state, during a five-years' residence, shall be recognized by the former state as citizens of the latter state. Qualifying the obligation of the former state is Article III, which provides that if such person returns and applies to be restored to his former citizenship, the former state may receive him as a citizen. However, Article III does not limit the operation of Article I except to provide that a citizen of one country who is naturalized in another country and thus loses his original citizenship (under Article I) may be taken back into his native country if he returns there to reside.

Article III of the Protocol to the Convention contains a further, nonreciprocal provision. It prescribes that if a Swede who has become a naturalized citizen of the United States renews his residence in Sweden without intent to return to America (which may be shown affirmatively or by failure to rebut a presumption arising from two years residence in Sweden), he renounces his American citizenship. This renunciation of American citizenship would be effective whether or not Sweden exercised her right (under Article III) to admit him to Swedish citizenship. Thus, it has happened

that a German who became naturalized in the United States and returned to Germany to live lost his American citizenship, under a treaty provision substantially the same as Article III of the Protocol to the Swedish treaty, although at the same time he did not resume his German nationality, and thus was put in a status of statelessness.[2]

Accordingly, under Article III of the Protocol, Mr. Gustav Elg, a Swede naturalized in the United States, lost his American citizenship when he returned to Sweden without the intent to return to the United States. However, Article 8, par. 2, of the Swedish Law of October 1, 1894, drafted so as to prevent the treaty from resulting in the statelessness which occurred in Germany, provided that Mr. Elg thereby reacquired Swedish citizenship. Under Article 8, par. 3, of this law, according to the Government's understanding, Miss Elg, then resident in Sweden, also became a Swedish citizen.

The result of Miss Elg's becoming a Swedish citizen was that she lost her American citizenship—not under Article III of the protocol, as did her father, but under Article I of the Convention itself, which provides that United States citizens who, during five years' residence in Sweden, "have become and are lawfully recognized as citizens of

[2] See original Brief for the Petitioners, p. 52, note 47, referring to 3 Moore, Int. Law Digest, 749, which discusses German Foreign Office to Mr. Kasson, American Min., Dec. 31, 1884, For. Rel. 1885, 393; Mr. Frelinghuysen, Sec. of State, to Mr. Kasson, Feb. 7, 1885, *id.*, 399, 400; Count Hatzfeldt to Mr. Coleman, May 16, 1885, *id.*, 417.

Sweden" shall be treated as such by the United States. Moreover, in so far as the treaty is concerned, she did not lose her American citizenship solely because her father lost his American citizenship. She lost her American citizenship because she both (1) acquired Swedish citizenship (when her father acquired Swedish citizenship), and (2) *resided for five years in Sweden*. This five-year residence in Sweden is an independent factor which was not a condition of the loss of American citizenship by Mr. Elg under Article III of the Protocol, and was a condition of the loss of American citizenship by Miss Elg under Article I of the Convention, a condition which was satisfied in this case.[3]

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

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[3] It does not affect the result in this case whether, for purposes of Article I of the Convention, Miss Elg's residence in Sweden started in 1911 when she arrived with her mother (in which event she lost her American citizenship in 1924 when she acquired her Swedish citizenship), or whether her "residence" in Sweden started in 1922 when her father moved to Sweden and established a domicile there (in which event she lost her American citizenship under Article I in 1927, or three years after her father lost his American citizenship under Article III of the Protocol).

APPENDIX A

DEPARTMENT OF STATE,
Washington, D. C., October 7, 1931.

In reply refer to Le 130–Tobiassen, Ingrid Therese.

The Honorable THE ATTORNEY GENERAL.

SIR: The Department has received your letter of September 22, 1931, concerning the question of the citizenship of Ingrid Therese Tobiassen, who applied for a passport of the United States in April last and was denied a passport, in a letter of April 9, 1931, because it appeared that she had lost her United States citizenship through naturalization in Norway, in which country she had resided from 1919 to 1929. She applied for a passport for use in visiting Norway, but alleged that her permanent residence was in this country, and that she intended to return to the United States within one year. It appears that, after receiving the letter just mentioned, Miss Tobiassen applied to the Department of Labor for a reentry permit, as an alien, under the provision of Section 10 of the Immigration Act of May 26, 1924, but that the Department of Labor considers that she is still a citizen of the United States and therefore is not entitled to a return permit. The question whether she has lost her United States citizenship was submitted to you by the Department of Labor in a letter of August 11, 1931, accompanied by a memorandum of the Solicitor for the Department of Labor of the same date.

Enclosed herewith is a copy of this Department's letter of April 9, 1931, mentioned above, and it will be observed that the ruling of this Department that

Miss Tobiassen had ceased to be a citizen of the United States was based upon the understanding that she had been naturalized as a Norwegian subject, under the provision of Section 6 of the Norwegian nationality law of August 8, 1924, through her father's naturalization as a Norwegian subject, under Section 4 of the same Act, resulting from his reacquisition of a residence of a permanent character in Norway. Translations of the Norwegian statutory provisions just mentioned are quoted in full in the Department's letter of April 9.

This Department has for many years uniformly held that former citizens of the United States who have been naturalized during minority in foreign States through the naturalization of their parents must be regarded as having lost their American nationality under the provision of Section 2 of the Act of Congress of March 2, 1907 (34 Stat. 1228) "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws"; also that the provisions contained in the naturalization treaties between the United States and other countries, including the naturalization treaty of May 26, 1869, with Norway and the Protocol of the same date, are applicable to the cases of persons naturalized during minority through the naturalization of their parents, as well as to the cases of persons naturalized after attainment of majority upon their own applications. In this connection I enclose, for your information, an excerpt from a memorandum of the Solicitor, dated August 17, 1926, concerning the case of one Baldura Schmidt, a native of this country who was naturalized as a German subject through the naturalization of her

father. As indicated therein, this Government has insisted that persons of foreign birth who have been naturalized as citizens of the United States during minority through the naturalization of their parents should not be held for the performance of military service in the foreign countries from which they came upon the ground that, notwithstanding their naturalization in the United States, they retained their original nationality and the obligations attendant thereupon. This Department has contended that their naturalization should be regarded as complete, and that such persons should not be regarded as having a dual allegiance.

If it is true, as assumed in this Department's letter of April 9, 1931, and as apparently conceded by the Department of Labor, that Miss Tobiassen was naturalized as a Norwegian subject, through the naturalization of her father as such, it is this Department's opinion that she should be regarded as an alien. However, in view of the importance of the question, it seems desirable to ascertain definitely from the Norwegian authorities whether Miss Tobiassen is regarded as having been naturalized as a Norwegian subject. An instruction is therefore being sent to the Legation at Oslo to obtain this information, and, upon the receipt of a reply, you will be duly advised.

Very truly yours,

For the Secretary of State:

(Sgd.) WILBUR J. CARR,
Assistant Secretary.

Enclosures:

From Department to Miss Tobiassen, April 9, 1931; Excerpt from memorandum of August 17, 1926.

APRIL 9, 1931.

In reply refer to 130–Tobiassen, Ingrid Therese.

Miss INGRID THERESE TOBIASSEN,

130 Hodge Road, Princeton, New Jersey.

MADAM: The Department has received the passport application which was executed by you in the Passport Agency at New York City on April 1, 1931. It appears that you were born in the United States on February 15, 1911; that your father, Mr. G. M. Tobiassen, was born in Norway and that your father was naturalized a citizen of the United States by the United States District Court for the Southern District of New York at New York City on February 20, 1912. It further appears that in 1919 your parents returned to Norway where they have since resided and that you resided in Norway with your parents until 1929.

Your attention is invited to the following provisions of Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway of June 14, 1871, and Article III of the Protocol thereto:

> ARTICLE I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such. * * *
>
> ARTICLE III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the govern-

ment of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

ARTICLE III. Relating to the third article of the convention.

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the Government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

Your attention is also invited to Sections 4 and 6 of the Norwegian Nationality Law of August 8, 1924, which in translation read as follows:

SECTION 4. Any person who is a natural born Norwegian subject, and who has ceased to be a Norwegian subject, will again become a Norwegian subject by taking up his regular domicile in Norway. If, however, he ceases to be a Norwegian subject through acquiring a foreign nationality, or if he later acquired foreign nationality, he will not again be deemed to be a Norwegian subject until he has ceased to be of foreign nationality.

SECTION 6. When a person becomes a Norwegian subject in pursuance of Section 2 or of Section 4, his wife, and unmarried children under eighteen years of age, born in wedlock, shall also be deemed to be Norwegian subjects, provided they reside in Norway. If they do not reside there, and the wife subsequently, the marriage being in

force, or the children, being unmarried and under eighteen years of age, take up his (their) residence in Norway, he (they) shall then be deemed to be Norwegian subjects provided the husband still is a Norwegian subject.

In view of the circumstances of your case as set forth in your passport application and of the provisions of the treaty and Norwegian Law quoted above the Department is obliged to consider that your father has reacquired Norwegian nationality; that you became a Norwegian National through his reacquisition of Norwegian Nationality and that accordingly you have ceased to be an American citizen and are not entitled to receive a passport of this Government.

The passport fee of $5.00 which accompanied your application under acknowledgement is returned herewith.

Very truly yours,

R. B. SHIPLEY,
Chief, Passport Division.

Enclosure:
Check for $5.00.

[Excerpt]

AUGUST 17, 1926.

NATIONALITY OF A NATIVE AMERICAN WHO HAS BEEN NATURALIZED IN A FOREIGN COUNTRY THROUGH THE NATURALIZATION OF A PARENT

CASE OF BALDURA SCHMIDT

* * * * *

In an instruction of March 6, 1899, to the Minister to Belgium, Secretary Hay said, with reference

to the status of a person who had been naturalized through the naturalization of his father as a citizen of this country:

> A person properly claiming naturalization under this statute (2172 R. S.) is as completely naturalized as if he had complied with conditions of the general naturalization laws of the United States, and would not, if he left the jurisdiction of the United States, have to comply with the requirements of Revised Statutes 2167, by taking out naturalization papers for himself. (For. Rel. 1899, 87, 3 Moore's Digest, 470.)

With reference to the status of one Anton Macek, Secretary Hay made the following statement, in an instruction of January 22, 1900, to the American Minister to Austria-Hungary:

> It is not necessary that naturalization should be a strictly judicial act, as in the case of the original naturalization of an alien father. The minor son is just as much naturalized by the fact of being within the jurisdiction of the United States at the time of the father's naturalization, or coming within that jurisdiction subsequently during minority, as if he himself had been admitted to citizenship by a decree of the court. * * *
>
> The view that citizenship acquired by a minor through the parent's naturalization is in effect a process of naturalization according to law, obtains in applying the German-American naturalization treaties, where evidence that a minor child has acquired citizenship through the father, according to the laws of the United States, coupled with evidence that the minor had resided at least five years in the United States, are taken to ful-

> fill the conditions of the treaty—that is, in effect, to show that the minor child has been naturalized according to law. (3 Moore's Digest, 472.)

The question under consideration was discussed at considerable length in the case of John Haberacker, a native of Bavaria, whose mother, after becoming a widow, married one Andrew Knauss, a naturalized American citizen of Bavarian origin. This Government insisted that the German Government should recognize the naturalization of John Haberacker through his mother's naturalization, which resulted from her marriage to an American citizen. In this relation attention was called to the decision of one of the circuit courts of appeals in the *United States* v. *Kellar,* 13 Fed. 82, in which it was held that a minor in similar circumstances was naturalized as a citizen of the United States. In an instruction of March 26, 1891, to the Minister to Germany, concerning this case, Acting Secretary Wharton said:

> In consideration of the uncontradicted opinion of the supreme courts of two of our greatest States and the decision of one of the justices of the Supreme Court of the United States upon this point, it is believed that the Royal Bavarian Government will accept this interpretation as correct in the premises and readily assent to treat Haberacker as an American citizen. (For. Rel. 1891, 507; 3 Moore's Digest 478.)

It is interesting to observe that the German authorities in the Haberacker case did not deny that minor children of German origin in general, who were naturalized as citizens of the United States through the naturalization of their parents should

be recognized as having acquired American citizenship and as having lost their German nationality. The contention of the German authorities was simply that acquisition of American citizenship by a minor through his mother's acquisition of such citizenship by marriage could not properly be regarded as naturalization.

It is quite true that the naturalization treaties between the United States and German States have been abrogated, so that it can not properly be held that Baldura Schmidt lost her American citizenship under any treaty provision.[1] However, it is believed that her case comes squarely within the purview of the provision of Section 2 of the Expatriation Act of March 2, 1907, that: "Any American citizen shall be deemed to have expatriated himself when he has been naturalized in a foreign State in conformity with its laws." It is entirely clear from the statement of the German Foreign Office, mentioned above that Baldura Schmidt was naturalized in Germany "in conformity with its laws," through her father's naturalization as a German subject.

Not only does the case of Baldura Schmidt appear to come within the letter of the second paragraph of Section 2 of the Expatriation Act of March 2, 1907, but it is believed that it also comes within the spirit of this statute. The naturaliza-

[1] Nevertheless Article 278 of the Treaty of Versailles, the benefit of which accrues to the United States under its Treaty of Peace with Germany, requires Germany to recognize the naturalization of Germans in this country "pursuant to naturalization laws" as having "in all respects severed their allegiance to their country of origin."

tion of minor children through the naturalization of their parents is provided for, in one form or another, in the laws of all countries. One of the first important laws passed by the First Congress of the United States was the Naturalization Act of March 26, 1790, and this statute made provision for the naturalization of minor children dwelling within the United States, through the naturalization of their parents. This law has been modified as to certain details from time to time, but the general principle of the naturalization of minor children through the naturalization of their parents has been retained from the beginning. The last change in the law was made in Section 5 of the Citizenship Act of March 2, 1907, the object of which was to make it a condition of the naturalization of minor children that they should have taken up a residence of a permanent character in this country. These statutes are all based upon the ancient legal concept of the solidarity of the family, which involves the legal principles of the right of parents to control and their duty to guard and provide for minor children whom they have brought into the world. It would be a manifest absurdity for this Government to insist upon its right to confer American naturalization upon the minor children of aliens naturalized in this country and at the same time to deny the right of foreign countries to naturalize minor children of American origin through the naturalization of their parents. It might be contended that this Government could recognize the naturalization of Baldura Schmidt as a German subject, while at the same time holding that she has not lost her American nationality. This, however, would be contrary to the position

that this Government has maintained for many years with regard to the status of naturalizd citizens, namely, that naturalization involves not only the acquisition of a new nationality but the loss of former nationality.

This Department for years past has uniformly held that the naturalization of an American minor child in a foreign country through his father's naturalization resulted in a loss of American nationality. It would seem to be reasonable that such a person, upon reaching his majority, should be able to reacquire American nationality through some simple process, after reestablishing a residence in the United States. This, however, would require special legislation.

For the reasons mentioned above, and in view of the numerous precedents mentioned, it is believed that a passport should be denied to Baldura Schmidt upon the ground that she lost her American citizenship, under the provision of Section 2 of the Act of March 2, 1907, when she was naturalized as a German subject through the naturalization of her father.

APPENDIX B

TRANSLATION

MINISTRY FOR FOREIGN AFFAIRS.

By a note of the 17th of this month the Legation of the United States of America requested of the Ministry for Foreign Affairs certain information regarding the nationality of Miss Marie Elisabeth Elg and her Father, Mr. Gustav Elg.

In reply to this request, the Ministry has the honor to communicate the following:

According to the provisions of the convention concluded May 26, 1869, with the United States of America concerning the nationality of emigrants and the additional protocol to the aforementioned convention, as well as the provisions of Article 8, Paragraph 2, of the law of October 1, 1894, concerning the acquisition and loss of Swedish nationality, Mr. Elg recovered Swedish nationality when he again took up his residence in Sweden and was domiciled there for a period of two years. If Miss Elg was domiciled in Sweden at the time her father regained his Swedish nationality, she acquired Swedish nationality at the same time as her father (Article 8, Paragraph 3, of the aforementioned law).

Stockholm, October 30, 1934.

To the Légation of the United States of America,
Stockholm.

APPENDIX C

DEPARTMENT OF LABOR,
OFFICE OF THE SECOND ASSISTANT SECRETARY,
Washington, August 11, 1931.

8-249
Permit #755394

Honorable WILLIAM D. MITCHELL,
The Attorney General.

MY DEAR MR. ATTORNEY GENERAL: I have the honor to request that you furnish me with your opinion on the citizenship status of Miss Ingrid Therese Tobiassen, who has applied to this Department for a return permit under the provisions of Section 10 of the Immigration Act of May 26, 1924 (43 Stat. 161; 8 U. S. C. 213). Miss Tobiassen is now twenty years of age and was born in New York City on February 15, 1911. Her father was born in Norway and became a citizen of the United States by naturalization on February 20, 1912, in the United States District Court for the Southern District of New York. It appears that in 1919 Miss Tobiassen, who was then about eight years old, was taken by her parents to Norway and the parents have since resided in that country. In 1929, at the age of eighteen years, Miss Tobiassen returned to the United States and so far as the record indicates has taken up her permanent residence in the City of Princeton, State of New Jersey. Her purpose in asking for a reentry permit is that she may visit her parents in Norway. From a letter in the file of this Department, it appears that the Passport Division of the Depart-

ment of State has declined to issue a passport to Miss Tobiassen on the ground that she has acquired Norwegian nationality and has ceased to be an American citizen, basing this decision on certain articles of the naturalization convention between the United States and Sweden and Norway of June 14, 1871, and, for the further reason, because of certain provisions of the Norwegian nationality law of August 8, 1924, quoted in the letter of that Department to Miss Tobiassen, dated April 9, 1931, which may be found in the Department's file.

It is the view of the Solicitor for this Department that Miss Tobiassen has not lost her American citizenship by reason of the fact that her parents took up permanent residence in Norway and that at the most Miss Tobiassen should be held to be a citizen of the United States and a subject of Norway under Norwegian law. Because of the importance of this question in the administration of the immigration laws, your opinion is respectfully requested on the question of the citizenship status of Miss Tobiassen at this time. In accordance with the usual practice, and under your rules, the written opinion of the Solicitor for this Department is being forwarded herewith. The Department's file is also inclosed and I will thank you to return that file when it has served its purpose.

I am, Sir, with great respect,

Very sincerely yours,

(sgd.) W. W. HUSBAND,
W. W. Husband,
Second Assistant Secretary.

Inclosure
#17171

8-249
Permit #755394

AUGUST 11, 1931.

MEMORANDUM FOR THE SECOND ASSISTANT SECRETARY.

In re citizenship status of Ingrid Therese Tobiassen

By direction of the Second Assistant Secretary the question has been submitted to this office as to the citizenship status of Ingrid Therese Tobiassen. The question arises by reason of the filing of an application for reentry permit under Section 10 of the Immigration Act of May 26, 1924 (43 Stat. 161; 8 U. S. C. 213). From this application it appears that the young woman in question was born in New York City on February 15, 1911, and she gives her present place of permanent residence as being in the United States at Princeton, New Jersey. She desires to visit her parents, who are residing in Norway. A letter in this file from the Norwegian America Line Agency, Inc., to the Congressional Information Bureau of this city indicates that the young woman resided in Norway for some time with her parents and was readmitted to the United States in April 1929 as a United States citizen. Recently, it appears, she applied for a passport from the Department of State, but this was refused on the ground that she acquired Norwegian nationality and had ceased to be an American citizen. In the file is a letter to this young woman from the chief of the Passport Division of the Department of State to the effect that because her father, after having been naturalized as a citizen in the United States, returned to Norway, his native country, and has resided therein since 1919,

he has lost his American citizenship and has reacquired his original Norwegian nationality. The chief of the Passport Division states that because of Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway of June 14, 1871, and Article III of the Protocol thereto, and by reason of Sections 4 and 6 of the Norwegian Nationality law of August 8, 1924, the father of this family having reacquired Norwegian nationality, the young woman in question has also taken Norwegian nationality through the reacquisition of Norwegian nationality by the father, and accordingly has ceased to be an American citizen and is not entitled to receive a passport from the United States Government.

From the file in this case it seems that Miss Tobiassen is now twenty years of age and is a native-born citizen of the United States, having been born in New York City in the year 1911. Her father, who was born in Norway, was naturalized as a citizen of the United States by the United States District Court for the Southern District of New York at New York City on February 20, 1912. In 1919 the parents of Miss Tobiassen returned with her to Norway, where they apparently have since resided. At that time, it will be noted, Miss Tobiassen was only eight years of age. She resided in Norway with her parents from 1919 until 1929, when she appears to have returned to the United States at the age of eighteen years, was admitted as an American citizen, and, so far as the record would indicate, has taken up her permanent residence in this country. Her proposed trip to Norway at this time is for the purpose of visiting

her parents merely. She is entitled to a return permit if she is an alien.

Bearing in mind that she was taken to Norway by her parents when a small child and has apparently returned to the United States and taken up her permanent residence herein, the question involved is whether this young woman lost her American citizenship through the action of her father in returning to Norway and taking up his permanent residence in that country. The decision of the chief of the Passport Division of the Department of State in deciding that this woman lost her American citizenship is based on Articles I and III of the Naturalization Treaty between the United States and Sweden and Norway which was concluded on May 26, 1869, consented to by the Senate on January 8, 1872, and proclaimed on January 12, 1872 (Malloy, Treaties, Conventions, &c., Vol. 2, page 1758). That convention was entered into between the President of the United States and the King of Sweden and Norway, and notwithstanding the fact that since the date of that convention Norway has separated from Sweden and has set up an independent Government of its own the Department of State regards this treaty as in force and effect between this country and Norway. Article I of this convention reads as follows:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.
>
> Reciprocally, citizens of Sweden or Nor-

way who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Sweden and Norway to be American citizens, and shall be treated as such.

The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired.

Article III of the convention provides:

If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the Government of the last-named country is authorized to receive him again as a citizen on such conditions as the said Government may think proper.

In a protocol to this convention, signed on the same day, certain observations were made to more exactly define and explain the contents of the convention, and from this protocol, as well as from the articles of the convention itself, it appears that the convention was entered into for the purpose of providing for the reacquisition of nationality by return to the country of birth after naturalization in one of the other countries. In Article III of the protocol the third article of the convention is more exactly defined and explained as follows:

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by

the Government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when a person so naturalized resides more than two years in Sweden or Norway.

There is nothing in the file at hand to indicate positively that the Government of Norway regards the father or Miss Tobiassen as a Norwegian subject under Articles I and III of the convention, although apparently he has taken up his permanent residence in Norway after having been naturalized in the United States in 1912. From Article III of the protocol there arises a presumption at least that the father has become a Norwegian subject in view of the fact that he has resided for more than two years in Norway and therefore the Government of the United States is entitled to hold that he has renounced his American citizenship under the convention. Apparently, however, a different situation exists in the case of Miss Tobiassen. Under the Fourteenth Amendment to the Constitution of the United States she became a citizen of the United States at the time of her birth in New York City in 1911. The mode of expatriation prescribed under the laws of the United States is found in Section 2 of the Act of March 2, 1907 (34 Stat. 1228; 8 U. S. C. 17), which declares that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken the oath of allegiance to any foreign state." It is said by John Bassett Moore in his Digest on International Law, compiled prior to the Expatriation Act of 1907, that the word "expatriation" has often

been used in the sense of forfeiture of the right to national protection instead of in the full sense of change of home and allegiance. Under Clause 4 of Section 8 of Article I of the Constitution it is provided that Congress shall have power to establish a uniform rule of naturalization. There is some question as to the extent of the power even of Congress to take away citizenship acquired by birth in the United States. In *United States* v. *Wong Kim Ark,* 169 U. S. 649, 703, the Supreme Court said, "The power of naturalization vested in Congress by the Constitution is a power to confer citizenship, not a power to take it away." The Congress of the United States, it is generally understood to mean and is defined in Section 1 of Article I of the Constitution, as consisting of a Senate and a House of Representatives. While Congress may have a right to declare what acts shall expatriate a citizen and forfeit right to protection abroad (*Ex parte Ng Fung Sing,* 6 Fed. (2) 670) under the provision giving Congress the right to pass a uniform rule of naturalization, there is some question whether the treaty-making power of the United States has a right to enter into any agreement with a foreign country which results in the expatriation of a native-born citizen of the United States without any positive act of expatriation by such citizen. Certainly, the mere remaining in a country for a temporary period by a native-born citizen of the United States should not be held to be an act of expatriation unless such conclusion is inescapable. (See *Leong Kwai Yin* v. *United States,* 31 Fed. (2) 738; and *Leon Wah Sut* v. *United States,* 31 Fed. (2) 740.) As prescribing a rule for the protection abroad of American citizens the conven-

tion is not open to question, but surely whatever presumption of expatriation may arise thereunder is overcome in at least the instant cases by reason of the return of Miss Tobiassen to this country and her taking up her permanent residence here. It is open to question that the Naturalization Convention is intended to apply to any except naturalized citizens who have returned to the country of birth.

It should be noted that when the father of Miss Tobiassen left the United States and took up his residence in Norway this country was still at war with Germany, and it is provided by Section 2 of the Expatriation Act of March 2, 1907, supra, "that no American citizen shall be allowed to expatriate himself while this country is at war." It is apparent from the facts in this case that Miss Tobiassen had no control over the matter of her removal in 1919 to Norway, nor her residence therein for a number of years thereafter, and it is significant that at the age of eighteen years she returned to this country and apparently has taken up her permanent residence here. In *United States ex rel. Baglivo* v. *Day,* 28 Fed. (2d) 44, it was held that a native-born citizen of this country who has not attained the age of twenty-one years can not renounce allegiance to the United States. The Baglivo decision was followed by Judge Goddard in the case of Carlos Pastizzo on August 15, 1929, unreported, and the same conclusion was reached on March 18, 1929, by Judge Massee of the United States District Court for Hawaii in the case of Shizeru Kumagi, unreported. It will be recalled that on July 28, 1915, the Attorney General held in the Berryman case that the wife of a citizen of the United States did not lose her American citizenship when her

husband expatriated himself by taking an oath of allegiance in Canada, the Attorney General declaring it to be a harsh doctrine to hold that a person who had in fact performed no act of her own volition should be placed in the position of having lost American citizenship (30 Att. Gen. 412).

Apparently, the persuading factor in the holding of the Passport Division of the State Department that Miss Tobiassen acquired Norwegian nationality and had lost her American citizenship is because of Section 6 of the Norwegian Nationality law of August 8, 1924, which is quoted in a letter of that Department to Miss Tobiassen as follows:

> When a person becomes a Norwegian subject in pursuance of Section 2 or of Section 4, his wife, and unmarried children under eighteen years of age, born in wedlock, shall also be deemed to be Norwegian subjects, provided they reside in Norway. If they do not reside there, and the wife subsequently, the marriage being in force, or the children, being unmarried and under eighteen years of age, take up his (their) residence in Norway, he (they) shall then be deemed to be Norwegian subjects provided the husband still is a Norwegian subject.

It appears to this office that it would be a strange situation if the law of a foreign country can be held to result in the expatriation of a native-born citizen of the United States. Obviously, all the Norwegian law does is to make the wife and the unmarried children of Mr. Tobiassen subjects of Norway, but there seems to be no sound reason why Miss Tobiassen can not be held to be an American citizen and yet a subject of Norway also, since it is well known that under the laws of the various governments of

the world persons have a double allegiance or dual citizenship. For example, a child born in this country of French, or English, or Italian parents, is a citizen of the United States by reason of birth in this country and may be a citizen or subject of the country to which the parents owe allegiance as well. Likewise, an Italian subject, for example, may become naturalized under our laws and have a child born in Italy, and such child may be a subject of Italy by reason of birth therein, but under Section 1993 of the Revised Statutes the child also is a citizen of the United States. There is nothing anomalous, therefore, in the fact that Miss Tobiassen may be a subject of Norway under Norwegian law and still be an American citizen by reason of birth in the United States and the fact that through no voluntary act of her own has she expatriated herself. It should be noted that Miss Tobiassen was a small child when taken by her parents to Norway, could, therefore, have formed no intent to abandon her residence in the United States, that she returned to this country as soon as she became self-supporting at the age of eighteen years, and, so far as her statements would indicate, regards the United States as her permanent residence to which she intends to return after her contemplated temporary visit to Norway. Accordingly, it is the opinion of this office that Miss Tobiassen never took up permanent residence in Norway and was not expatriated by reason of the return of her father to the country of his nativity. She is, therefore, a citizen of the United States and, apparently under Norwegian law, may be also a subject of Norway. In view of the fact that this decision is apparently in conflict with the decision of the Department of

State on the status of Miss Tobiassen, it is respectfully recommended that this question be put to the Attorney General for a final decision.

THEODORE G. RISLEY,
Solicitor.

BWB/gms

APPENDIX D

Address Reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894.

U. S. DEPARTMENT OF LABOR,
IMMIGRATION AND NATURALIZATION SERVICE,
Washington, February 7, 1939.

Memorandum:

Prior to June 16, 1932, when the Attorney General rendered his opinion in the case of "Citizenship of Ingrid Therese Tobiassen" (36 Op. Atty. Gen. 535), it was the view of the then Bureau of Naturalization, and it so advised members of the public when such cases arose that retention of citizenship was a personal matter and expatriation could not be accomplished through the act of the father. This view was based upon a dictum contained in the opinion of the Supreme Court in *United States* v. *Wong Kim Ark* (169 U. S. 649, 704). The particular language involved is as follows:

> Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents or of any other country; for by our law, as solemnly declared by Congress "the right of expatriation is a natural and inherent right of all peo-

ple" * * * Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful.

Upon the rendition of the Attorney General's opinion in the *Tobiassen* case, the administrative view upon the subject was modified to conform to the Attorney General's opinion.

Careful effort has been made to locate and identify circular notifying the Field of change of practice with regard to the admissibility of children on birth certificates, but it appears that the copy of the Attorney General's opinion was sent without any accompanying comment.

With respect to the figures showing the number of cases, they are only an approximation, and it is not possible to even approximate the number who have been readmitted on passports or birth certificates.

Attached hereto are copies of letter of Aug. 11, 1931, from this Department to the Attorney General and Solicitor's memorandum of same date, re citizenship of Ingrid Therese Tobiassen.

(Sgd.) T. B. SHOEMAKER,
Deputy Commissioner.

Enclosures.

APPENDIX - E

Consular Statute Book of Sweden (1910), p. 3:

Law on the Acquisition and Loss of citizenship, dated the 1st of October, 1894.

Art. 8. Any one forfeiting his or her rights as a Swedish citizen in consequence of article 7, and not becoming a citizen of any other country regains those rights on again settling in Sweden, or if the King permits that the citizenship may be regained without so doing.

If the King has entered into a convention with a foreign Government that any person previously of Swedish nationali having acquired citizenship in that foreign country shall be considered as having renounced such right when he again takes up his domicile in this Country and after he has been living here for a certain time; if any person for such reason loses his foreign citizenship, he regains his Swedish citizenship at the same time.

If in accordance with the above stipulations of this article Swedish right of citizenship has been regained by the husband and father, such right also accrues to his wife and legitimate children under age, unless in the case mentioned in the second part they neither are domiciled in this Country when citizenship is regained by the husband and father, nor have lost their citizenship in the foreign country together with him. *Law of the 7th of May 1909.*

APPENDIX E

"Note" to Article 8 of the Swedish Law of October 1, 1894, contained in "Statute Book for Legations and Consulates" (1931)

NOTE.—This Article, as is clear from its wording, only bore application in the case of a person who had been a Swedish citizen, and hence not as regards the widow of a person who was formerly a Swedish citizen and, pursuant to Art. 7 of the Act, had already lost Swedish citizenship at the date of the marriage, nor as regards children who were born after the loss of Swedish citizenship, pursuant to this Article of the Act, by the father, or, in the case of children born out of wedlock, by the mother.

On the other hand, the enactment did bear application in the case of such persons as were excluded from the possibility of retaining Swedish citizenship by the handing in, pursuant to the last sentence of the first section of Art. 7, of a declaration such as is spoken of in the Article named. Thus, to descendants down to the third generation of a person who had emigrated from Sweden, the enactment secured a right to acquire Swedish citizenship.

Finally, it should be observed that the proviso of a person's "not having become a citizen of some other country" was not introduced with a view to exclude such persons as by virtue of birth have acquired citizenship both in Sweden and abroad. (Cf. the first section of Note to Art. 8 in the 1924 Act.)

The particular Agreements that the second sentence of the Article has in view are: firstly, the Convention signed with the United States of North America on 26 May 1869 respecting the nationality of persons who have emigrated, and the Protocol thereto of the same date, and secondly, the Supplemental Article to the Friendship, Trade and Navigation Treaty signed with the Argentine Republic on 17 July 1885. According to both those Agreements a previous Swedish citizen who has been admitted to the citizenship of the States above named, shall be deemed to have relinquished his new citizenship on his migration back to Sweden after he or she has resided in Sweden for the space of two years. The Agreements are only applicable in the cases of persons who have emigrated themselves, not consequently in those of their children who have been born in the country of migration.

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Petitioners,

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MARIE ELIZABETH ELG.

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OF

BRIEF FOR MARIE ELIZABETH ELG.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR MARIE ELIZABETH ELG.

OPINIONS BELOW.

The opinion of the District Court (R. 25-26)* has not been printed in the official reports; the opinion of the Court of Appeals (R. 31-39) is reported in 99 F. (2) 408.

*All references to the record are to the side folios (being the page numbers of the record submitted with the petitions for certiorari).

STATEMENT OF THE CASE.

Principal Questions.

The principal questions involved are (1) whether a natural born citizen of the United States can be deprived of her citizenship during her minority by the vicarious act of another and operation of foreign law; (2) whether a declaratory decree that she is a United States citizen will issue with respect to the Secretary of State.

History of Proceeding.

The above entitled causes are before this Court on writs of certiorari to the United States Court of Appeals for the District of Columbia.

The suits originated in the United States District Court for the District of Columbia in Equity proceeding No. 63408, filed January 14, 1937 as the complaint of Marie Elizabeth Elg, a natural born citizen of the United States, hereinafter referred to as the Plaintiff, against Frances Perkins, Secretary of Labor, Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and Cordell Hull, Secretary of State, hereinafter referred to as the Defendants, praying for (1) a declaratory judgment under the Federal Declaratory Judgments Act that she is a natural born citizen of the United States and entitled to all the rights and privileges of such a citizen; (2) a permanent injunction against the defendants Perkins and Shaughnessy enjoining them from instituting or continuing to prosecute proceedings for her deportation from the United States or in any way interfering with

her residence therein; (3) a permanent injunction against the defendant Hull enjoining him from making statements to the effect that she is not a citizen of the United States and from refusing to issue her a passport solely on the ground that she is not such a citizen; (4) a temporary injunction against the defendants Perkins and Shaughnessy enjoining them from taking further steps and proceedings to deport her pending final judgment in this action and (5) such further relief as may be proper and just (R. 6).

Upon statement in open court that the defendants Perkins and Shaughnessy would take no action to enforce the deportation of the plaintiff pending the final outcome of this case, a rule to show cause why a temporary injunction should not issue was discharged without prejudice to the rights of any of the parties on January 26, 1937 (R. 20-22).

The defendants on February 4, 1937 filed a motion to dismiss the bill of complaint on the ground that the plaintiff is not a citizen of the United States by virtue of the Laws of Sweden in conjunction with a protocol to a convention between the United States and Sweden and Norway and Section 2 of the Act of March 2, 1907 and for alleged defects in the pleadings, the form of the complaint and the jurisdiction of the Court (R. 23).

The parties stipulated that the Court may take judicial notice of the statutes of Norway and of Sweden, accepting as correct certain designated English translations but reserving the right in event of final hearing on evidence to produce expert witnesses to prove such foreign laws (R. 24, 25).

The cause was argued before the District Court and Judge Bailey rendered an opinion on November 1, 1937 that the motion to dismiss should be overruled as to the defendants Perkins and Shaughnessy, that the plaintiff is a natural born citizen of the United States and entitled to a declaratory decree to that effect, and that the complaint should be dismissed as to the defendant Hull "for the reason that the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue" (R. 25). Pursuant to the opinion final decree overruling the motion to dismiss as to defendants Perkins and Shaughnessy and declaring the plaintiff to be a natural born citizen of the United States and sustaining the motion to dismiss as to the defendant Hull and as to him dismissing the bill of complaint was entered November 18, 1937 (R. 26).

From the foregoing decree defendants Perkins and Shaughnessy and the plaintiff Elg appealed (R. 26).

The appeals were docketed as two separate causes in the United States Court of Appeals for the District of Columbia but consolidated for argument. On August 1, 1938 Chief Justice Groner delivered the opinion of the Court, affirming the decree of the District Court in all respects (R. 32-39) and on the same day order affirming the decree was entered (R. 39). Motion of plaintiff Elg, filed on October 15, 1938 for leave to file a motion to amend the decree was denied on October 19, 1938 (R. 41).

The mandate was stayed in the Court of Appeals; both the defendants Perkins and Shaughnessy and the plaintiff Elg filed petitions for writs of certiorari, which this Court granted.

Statement of Facts.

As these causes arise on the defendants' motion to dismiss the plaintiff's bill of complaint, the facts stated by the plaintiff in her pleadings must be taken as admitted or as though proven, to the same extent as though the causes had arisen on demurrer.

The plaintiff was a natural born citizen of the United States (R. 1; *Exhibit A*, R. 8; *Exhibit H-1*, R. 15). The defendants make no denial of this fact. She was born in Brooklyn, New York, October 2, 1907 (R. 1; *Exhibit A*, R. 8) of parents who had emigrated from Sweden and had become naturalized citizens of the United States prior to her birth, to wit, on September 24, 1906 (R. 2; *Exhibit A*, R. 8; *Exhibit C*, fol. R. 10; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15; *Exhibit H-3*, R. 19).

In or about 1911, when plaintiff was about four years of age, she was taken by her mother to Sweden, where she continued to live with her mother and later with both parents until she became twenty-one years of age, whereupon in 1929 she returned to the United States (R. 2; *Exhibit C*, fol. R. 10; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15).

On July 25, 1922 the plaintiff's father went to Sweden and has not since returned to the United States (R. 2, 4; *Exhibit H-1*, R. 15; *Exhibit H-3*, R. 19). However,

he retained his United States certificate of naturalization until at least November 13, 1934 when, defendants allege, he voluntarily surrendered it and executed a statement that he intended to remain in Sweden and did not desire to retain the status of American citizen (*Exhibit H-1*, R. 15; *Exhibit H-2*, R. 18; *Exhibit H-3*, R. 19). It does not appear of record that between 1906 when he became a naturalized citizen of the United States and November 13, 1934 when defendants allege he voluntarily surrendered United States citizenship, he took or subscribed to any oath of allegiance to any foreign country, or by voluntary or affirmative action on his part became naturalized in any foreign country, or committed any voluntary or affirmative act of expatriation from the United States or that any action was ever instituted to cancel his United States citizenship.

In 1928, before the plaintiff was twenty-one years of age, she inquired, through a friend, of the American Consul at Göteborg, Sweden about returning to the United States, and was informed that if she returned during her minority only an American birth certificate and identification papers would be necessary, but if she returned after attaining majority she should make application for and obtain an American passport (R. 2; *Exhibits B-1, B-2*, R. 9, 10). Accordingly, within eight months after attaining her majority, in 1929 the plaintiff applied at the American Consulate, Göteborg, for an American passport on the prescribed form of application, setting forth all of the pertinent foregoing facts then existent (R. 2; *Exhibit C*, fol. R. 10). This application was transmitted to the Secretary of State at Washington, D. C. and after its due considera-

tion, upon his express written instructions in conformity with the law as it was then interpreted and administered, the American Consul at Göteborg issued to the plaintiff, as a United States citizen, American Passport No. 91 (R. 2, 3; *Exhibits B-3, B-4,* R. 10, 11; *Exhibit D,* R. 11, 12). On September 17, 1929, within one year after attaining her majority, the plaintiff returned to the United States, was admitted at the Port of New York as a natural born United States citizen and has resided in this country ever since. The passport issued to the plaintiff in 1929 has never been recalled or cancelled (R. 3; *Exhibit E,* R. 12).

The plaintiff by her own voluntary or affirmative act has never committed any act of expatriation, nor become naturalized in any foreign country, nor taken or subscribed to any oath of allegiance to any foreign country, but on the contrary has at all times borne true faith and allegiance to the United States and has on several occasions taken and subscribed to the oath of allegiance to the United States (R. 1, 2; *Exhibits C and G,* fol. R. 10 and 14).

On this state of facts, in April, 1934, the plaintiff was subjected to proceedings instituted by the Immigration Service in New York City, was informed she was an alien, induced to execute a sworn affidavit substantially stating the foregoing facts which were made the basis of *ex parte* departmental inquiry and review at home and abroad. In April, 1935, she was formally notified that she was an alien illegally in the United States, that she could not remain in the United States, and she was ordered to depart from this country and threatened with deportation if she did not depart forthwith (R. 3; *Exhibit F-1,* R. 13; *Exhibits H-1, H-2,*

H-3, R. 15, 18, 19). The defendants Perkins and Shaughnessy from time to time postponed taking further steps toward her deportation, but have not countermanded their order and threats which have only been stayed pending final determination of this cause (R. 4; *Exhibits F-2, F-3*, R. 14; R. 21, 22).

In July, 1936, the plaintiff applied for an American passport upon an application in substance identical with her application of 1929 on which a passport had been issued to her, but the defendant Hull refused to issue a passport to her solely on the jurisdictional ground that he had not authority so to do because he had administratively determined she was not a United States citizen (R. 4, 5; *Exhibit G*, fol. R. 14; *Exhibit H-1*, R. 15).

Although the defendant Hull in the motion to dismiss contends that the bill should not lie against him because it involves the exercise of judgment and discretion in matters committed to his care as Secretary of State, from the Record it does not appear denial of a passport rested in any degree upon the exercise of his discretionary powers over the issuance of passports to United States citizens, but on the alleged ground that because she was not a United States citizen he lacked any jurisdiction to issue a passport to her (R. 4, 5, *Exhibit H-1*, R. 15; R. 23).

The defendants' conclusion that the plaintiff is not a United States citizen rests on the stated grounds that although she was a natural born United States citizen, nevertheless *during her minority* when about seventeen years of age, to wit, on July 25, 1924, *she expatriated herself* under the first paragraph of Section 2 of the Act of March 2, 1907, by virtue of the operation of

Swedish law. (R. 4, 24; *Exs. F-1, H-1, H-2, H-3, H-4,* R. 13, 15-20).

Further efforts before both the Departments of Labor and of State to establish the fact that the plaintiff was a United States citizen and therefore that the Secretary of Labor had no jurisdiction over her continued stay in the United States and that the Secretary of State did have jurisdiction to consider her application and authority in his discretion to issue an American passport to her, were of no avail. (*Exhibits F-2, F-3,* R. 14; *Exhibits H-2, H-4,* R. 18, 20).

There is no indication in the record that the plaintiff is in any way undesirable; on the contrary (although it does not appear in the printed record) the defendants have stated in open court in the course of arguments that the plaintiff is an entirely desirable person and that the only reason for the threatened deportation is their contention that she is an alien illegally in the United States.

Errors To Be Urged.

The Court of Appeals erred insofar as it affirmed that part of the decree of the District Court sustaining the motion to dismiss the bill of complaint as to the defendant Hull, and as to him dismissing the bill of complaint; and in failing to that extent to reverse the decree of the District Court and order the motion to dismiss to be overruled as to all defendants.

The plaintiff's complaint also contained prayers for permanent injunctions against the defendants which she will not press if the decree declaring her to be a natural born United States citizen is affirmed, but which she would press if this Court should deny her such declaratory decree.

Summary of Argument.

The plaintiff, a natural born citizen of the United States, cannot be divested of her birth citizenship during her minority. Particularly, she cannot be divested of her birth citizenship by the act of another or by operation of foreign law.

The Act of March 2, 1907, declaring that if a citizen commits certain acts he "shall be deemed to have expatriated himself" does not purport to apply, and does not apply, to native born minor children. For many years it has been construed not to apply to minors and it would be rendered unconstitutional by the construction for which the defendants contend.

The Treaty between the United States and Sweden and Norway is not self-executory, does not apply to minors, does not purport to divest any persons of citizenship, and would violate the Constitution if given the construction for which the defendants contend. Without discussing whether a treaty may in any circumstances transcend the Constitution, clearly it cannot do so to divest the native born of their birth citizenship against their will, with no showing of necessity or emergency for the general welfare, and as a mere matter of administrative convenience.

The plaintiff never acquired Swedish citizenship under the laws of Sweden, and therefore could not have been expatriated from the United States even upon the defendants' theories and contentions.

The plaintiff's bill for a declaratory decree lies against the Secretary of State as the controversy pertains to his *jurisdiction* of the matter, and not to his *exercise of discretion* after he has assumed jurisdiction. The plaintiff's bill lies against the other defendants; all requirements for proceeding under the Federal Declaratory Judgments Act have been satisfied. The declaratory decree should issue against all defendants.

ARGUMENT.

I.

Plaintiff is a natural born citizen of the United States by virtue of the Constitution of the United States.

1. Birth Citizenship.

The strongest argument that can be made in this case is the foregoing recitation of the undisputed facts which clearly show that the plaintiff was by birth a natural born citizen of the United States and that she has committed no act to divest herself of her birth citizenship.

Born in Brooklyn, New York, the plaintiff was a natural born United States citizen by virtue of Section 1 of the XIV Amendment to the Constitution, adopted in 1868, which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This Amendment was preceded by the passage in 1866 of the Civil Rights Act, which in part provided:

> "All persons born in the United States and not subject to any foreign power are declared to be citizens of the United States." (R. S., 1992; 8 U. S. C. 1.)

These provisions created no new law. They were in entire accord with the common or public law concept of citizenship and allegiance to the sovereign arising from the place of birth as it had consistently been construed

by our courts from earliest times with respect to all persons born in the United States and within its jurisdiction, except those of African descent whose ancestors had been held in bondage. They merely restated the existing law and extended it to embrace *all* persons born in this country and within its jurisdiction, including that class whom this Court in the Dred Scott Case *(Scott v. Sandford,* 19 Howard 393) had held were an exception to the general common law rule, and forever established the fact of citizenship by birth as the constitutional right of the native born American.

Nor was the concept of citizenship by birth new to the Constitution with the adoption of the XIV Amendment. The first section of the second article of the Constitution in part provides:

> "No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; * * *"

In the words of Mr. Justice Curtis,

> "It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the Constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the Constitution, which referred citizenship to the place of birth." (Dred Scott case, *supra,* p. 576.)

2. Incidents of Birth Citizenship.

United States birth citizenship connotes the highest status of membership in the group of people who comprise this nation. The terms "citizen" and "subject" are in some respects synonimous, but the former more properly applies to members of a self-governing

lation such as the United States, and the latter to those owing allegiance to a monarch or a superior body over which they exert little or no control. Thus all free persons born within the colonies of North America whilst subject to the Crown of Great Britain, were natural born British *subjects*, but following the separation of the colonies, those who adhered to the revolutionary cause became *citizens* of the United States. *(Inglis v. Sailors Snug Harbor*, 3 Peters 99, 120.) In the further words of Mr. Justice Curtis, "free persons born within either of the colonies were subjects of the King" prior to our independence, but after acquisition of sovereignty by the several States "all such persons ceased to be *subjects* and became *citizens*." (Dred Scott Case, p. 576.)

American tribal Indians, although born within territorial United States, were not United States citizens, were not entitled to a voice in our government, and were termed "Domestic Subjects", until very recently. (7 Op. Atty. Gnl. 746, *Relation of Indians to Citizenship.*) In the same category are citizens of the Philippine Islands, who are *subjects*, but not *citizens*, of the United States, over whom Congress has express control and jurisdiction although they have no representation therein.

This distinction is more fully exemplified by the difference between the American doctrine that although our citizens have an inherent right of voluntary expatriation, they cannot be involuntarily expatriated from the United States and the doctrine of monarchial countries that although their subjects have no inherent right of expatriation, they are subject to involuntary expatriation at the pleasure of the ruling power.

Birth citizenship differs from citizenship by naturalization in that the former is the status acquired by birth, guaranteed by the Constitution, over which the Congress has been given no control by any of the specifically delegated powers; whereas citizenship by naturalization is wholly by virtue of action of Congress to whom the Constitution by Art. 1, Section 8, Cl. 4 delegates the power

> "To establish a Uniform Rule of Naturalization . . ."
>
> "And this power granted to Congress to establish an uniform rule of *naturalization* is, by the well-understood meaning of the word, confined to persons born in a foreign country, under a foreign Government." (Chief Justice Taney, *Dred Scott Case, supra*, p. 417.)

"A naturalized citizen" said Chief Justice Marshall, "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual." *(Osborne v. Bank,* 9 Wheaton 738, 827.)

This doctrine was reiterated by Mr. Justice Gray when he said "The power of naturalization, vested in Congress by the constitution, is a power to confer citizenship, not a power to take it away." *(U. S. v. Wong Kim Ark,* 169 U. S. 649, 703.)

Whereas it may be contended that under the delegated power Congress has the authority to prescribe

not only on what terms the foreign born may become naturalized citizens, but on what conditions, not inconsistent with the original terms, they may retain that citizenship; nowhere can be found any delegated power or authority in Congress to prescribe, designate or control the terms or conditions on which the native born may retain or shall lose birth citizenship. However, that such power does not exist even with respect to naturalized citizens is evidenced by the fact that Congress has never passed any act prescribing divestment of citizenship by operation of law. It has, and properly, prescribed what voluntary acts on the part of the citizen might be deemed to be acts of expatriation, but the citizen is accorded a right to be heard, to rebut any presumption of voluntary expatriation which may have arisen against him and, even when the acts all exist, to refute the conclusion of expatriation by establishing a contrary intent on his part.

II.

The plaintiff has not expatriated herself. During her minority she was legally incompetent by her own act or by the act of another in her behalf voluntarily to expatriate herself. There is no provision of law or treaty order which she could be involuntarily expatriated.

As the plaintiff was undeniably a natural born United States citizen at birth, in order to sustain the defendants' contention that today she is an alien it must appear that she had the legal capacity voluntarily to expatriate herself and that she did so, or that

under the laws of this country she was subject to involuntary expatriation and that the necessary elements to effect such involuntary expatriation existed.

The plaintiff contends that during her minority she was legally incompetent either by her own act or by the act of another voluntarily to expatriate herself and that there is no provision in the Constitution or laws of the United States or in the treaties with foreign powers by virtue of which during her minority or afterwards she could have been expatriated involuntarily. The record shows that the plaintiff has committed no act of voluntary expatriation either before or after she attained her majority. (*Bagliro v. Day*, 28 F. (2) 44; *Ex parte Chin King*, 35 Fed. 354; letter of Honorable Charles E. Hughes, Secretary of State to American Diplomatic and Consular Officers dated November 24, 1923, published in *Compilation of Certain Departmental Circulars Relating to Citizenship, Etc.*, State Department, 1925, p. 118.)

1. Right of Expatriation.

Under the common law of England as construed at the date of our independence, no subject possessed the power of throwing off his allegiance and expatriating himself without the sovereign's consent. However, the birth and growth of this nation was predicated on the inherent right of *voluntary* expatriation in all persons which was generally recognized from earliest times in our own Courts. (*Shanks v. Dupont*, 3 Peters 242; *Inglis v. Sailors Snug Harbor, Supra; Dred Scott Case, Supra.)*

During the middle of the last century persons emigrated from all nations to this country, settled here, foreswore allegiance to their native countries and be-

came naturalized United States citizens. Many foreign governments denied the right of their subjects voluntarily to expatriate themselves and prosecuted them for desertion from military service and on other charges when they visited or returned to their native lands as United States naturalized citizens. That there might be no misunderstanding concerning the attitude and position of the United States in this respect, Congress restated the doctrine of voluntary expatriation and the law thereon as consistently construed by our courts, by passage in 1868 of an Act which declared:

> "Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic." (Act July 27, 1868, c. 249, Sec. 1; R. S. Sec. 1999; 8 U. S. C. 15.)

It is a far cry from the bold declaration made by our legislature that we would defend our naturalized citizens in all parts of the world in their inherent right voluntarily to expatriate themselves from their native countries and become citizens of the United States, to the efforts here and now being made to expatriate and

deport from this, her native, country one of our own natural born citizens, who is in this country and who is not being claimed or sought by any foreign country, on the theory that by operation of a foreign law she was somehow divested of her United States citizenship.

It would seem to be a distorted point of view that would twist the doctrine of the right of voluntary expatriation into an instrument involuntarily to deprive our own natural born citizens of their birthright during their years of minority and legal incapacity by virtue of foreign laws.

2. *Acts of Expatriation must be voluntary and intentional.*

It is the well established doctrine that the expatriation of a United States citizen can arise only from the voluntary intentional act of, and within the control of, the person affected; and that mere residence in a foreign country does not affect expatriation. Chief Justice Marshall, in delivering the opinion in *Murray v. The Charming Betsy* expressed the rule that has ever since been followed when he said

> "The American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our government; * * * But his situation is completely changed when by his own act he has made himself the subject of a foreign power." (2 Cranch 64, 119; and see III Moore, International Law Digest 711 *et seq.*)

All legislation on the subject and the vast weight of legal opinion contemplate a voluntary intentional act on the part of the expatriate. The only act under which

the plaintiff possibly could be held to have expatriated herself is the first paragraph of Section 2 of the Act of March 2, 1907, which provides:

> "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state." (34 Stat. 1228; 8 U. S. C. 17.)

The second paragraph of that section applies only to naturalized citizens, merely raises a presumption predicated upon voluntary acts, and expressly provides the presumption shall be rebuttable.

The mere passive acquisition of a foreign citizenship by having it *conferred* upon one by operation of a foreign government has not been deemed an act of expatriation.

> "Joel Barlow felt himself at home in Paris. In 1788, at the age of 34 he had first come abroad, and during 17 exciting years had been rather French than American. In 1792 the National Convention conferred on him the privileges of French citizenship—an honor then shared only by Washington and Hamilton among Americans." (III Moore's International Law Digest 715; quoting from 6 Adams History of the United States 245.)

Expatriation as the result of naturalization in a foreign country is predicated upon the customary form of voluntary, intentional naturalization. Acquisition or imposition of a foreign citizenship by virtue of acts which although voluntary and intentional, ordinarily would not be deemed to be acts of naturalization, have been construed not to constitute such a *naturalization in a foreign country* as to expatriate a United States

citizen performing such acts. (See III Moore's International Law Digest, 302, *et seq.)*

3. The Act of March 2, 1907 does not apply to natural born citizens during their minority.

The legislative history of Sec. 2 of the Act of March 2, 1907 clearly indicates it was never intended to apply to minor natural born United States citizens. It is practically based on the Report of the Citizenship Board appointed by Secretary of State Root in 1906 at the request of the Committee on Foreign Affairs of the House of Representatives. The report was adopted by that committee when Mr. Perkins, as its chairman, reported H. R. 24122 which eventually was enacted by Congress as the Citizenship Act of March 2, 1907 (34 Stat. 1228).

The report of the Citizenship Board was printed as Document No. 326 of the 59th Congress, Second Session. It sets forth the state of the law at the time and refers to the naturalization treaties then in force. At no place does it state that those treaties in any way affect or relate to minor children.

On the other hand, it quotes on page 76 Judge Deady's decision, *Ex parte Chin King,* 35 Fed. 354, 1888: "a father cannot deprive his minor child of the status of American citizenship • • • This status, once acquired can only be lost or changed by the act of the party when arrived at majority."

The report made various recommendations, one of which was that native-born citizens living abroad

should periodically register with diplomatic or consular officers of the United States. **This recommendation was not adopted.** (See *Cong. Rec., 59th Cong., Second Session, pages 1464-5.*)

Section 2 of the bill as reported contained a provision for the Secretary of State issuing to those desiring them and conforming to regulations, certificates of American citizenship. That section was stricken out as a committee amendment and Sec. 3 of the bill became Sec. 2 of the Act. The record shows that the bill probably could not have been passed otherwise.

There was very little debate in the House—forty minutes in all was allowed. *Mr. Perkins,* Chairman of the Committee, was in charge for the bill. As soon as the bill came up, *Mr. Lacey* asked if it was intended to pass the bill without the then Sec. 2 which related to certificates of citizenship, to which *Mr. Perkins* answered, *"Yes." Mr. Lacey, "So that it does not affect American-born citizens in residence abroad." Mr. Perkins, "No, that was stricken out."* This colloquy was preceded by some discussion in regard to the then Sec. 3 of the bill (Now Sec. 2 of the Act) in which Mr. Perkins said that it was drawn at the request of the State Department to meet the serious evil of naturalized citizens going back to their original countries and making trouble there and demanding protection as American citizens.

To a suggestion in the course of the debate raised as to whether Congress could constitutionally denationalize a citizen by reason of length of residence abroad, *Mr. Perkins,* chairman of the committee in charge of

the bill said, *"That does not apply to a man born in this country."* The question was also raised as to whether, in case a naturalized citizen lost his United States citizenship, so that he could not inherit under the laws of some states, that would not result also in the loss of heirship of his American-born heirs, and *Mr. Mann* said, *"Not his American-born heirs. They have their own citizenship."*

The bill was passed as amended (that is with original Sec. 2 omitted and Sec. 3 becoming Sec. 2 of the Act). The same action was taken in the Senate, where there was no debate, but reference was made to the elimination of Sec. 2 in the House bill.

As the bill was passed under suspension of the rules, it probably could not have passed at all if Mr. Lacey's question had not been answered by Mr. Perkins to the effect that it did not apply to native-born citizens, that the provision relating to their obtaining certificates of citizenship had been stricken out, and that loss of naturalized citizenship by parents should not affect their American-born children.

Congress certainly would not have attempted to entirely alter the law as to an entire class of native-born citizens without being absolutely explicit in making and defining those changes and definitely stating that a father could denationalize a native-born American minor child.

That Statute for many years was interpreted as not applying to or affecting natural born American minor children and it cannot now be reconstructed by inter-

pretation by writing into the first clause words to the effect that expatriation can be vicariously exercised for a minor by its father as that is contrary to the words of Judge Deady cited in the Citizenship Board Report (p. 76) which was also the report of the committee that "a father cannot deprive his minor child of the status of American citizenship conferred upon it by the circumstances of its birth under the Constitution."

To so change the statute would violate those elementary rules of statutory construction with which this Court is too familiar to require citations to sustain them, the most pertinent of which, however, is that a statute that is plain and can be administered in a manner that is wholly constitutional will not be interpreted in a manner to render it of doubtful constitutionality. That would certainly be the case if Section 2 of the Act of March 2, 1907, were now to be construed in the manner contended for by the defendants. As to its being of doubtful constitutionality, see *United States v. Wong Kim Ark*, and *Osborn v. Bank, supra.*

4. Long Established Practice recognized no loss of birth citizenship during minority.

In 1929 passport No. 91 *(Exhibit D)* was issued to the petitioner upon her full disclosure of all pertinent facts now before the defendants. While issuance to her of a passport may not be conclusive evidence that she is an American citizen, it is *prima facie* evidence of that fact, and when issued to her in the manner in which this passport was issued raises an almost irrebuttable presumption that it was properly issued in accordance with the law as then construed.

Under Section 4078 Rev. Stat. the Secretary of State issues passports and under Sec. 4076 Rev. Stat. "no passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States."

As to passports being *prima facie* evidence as to having been correctly issued see III Moore International Law Digest, 871 and 884 and Borchard's Diplomatic Protection, Ed. 1922, pp. 515 and 517.

In respect to so important a document and the facts thereby evidenced, the defendants cannot be heard lightly to repudiate the conclusions of their predecessors and brush them aside with a more allegation that the passport was issued in error. The rule of *omnia acta praesumuntur recte sunt* applies.

That it was not in error, but in accordance with the law as then construed is further evidenced by the communication relative to returning to the United States issued in 1928 by the American Consul in Sweden, the official representative abroad of the defendant Hull's predecessor (*Exhibits B-1, B-2*), and is confirmed by communication in 1935, by that Consul's successor, the official representative abroad of the defendant Hull (*Exhibits B-3 and B-4;* and see generally *Compilation of Certain Departmental Circulars Relating to Citizenship, etc., State Department, 1925.)*

That such was the accepted construction of the law is almost conclusively evidenced by the fact that the Labor Department adhered thereto and refused to deviate therefrom after the State Department effected an administrative change in its construction thereof resulting in the interdepartmental dispute which led

to the ill considered Tobiassen opinion (which will be discussed in detail below, p. 42).

The defendants Perkins and Shaughnessy in effect admit this in the letter of the Solicitor of the Labor Department to the Attorney General, dated October 18, 1938, and appearing as appendix B to their petition for certiorari filed in this case.

Thus, in 1929, under the then firmly established construction of law that a natural born American child could not be divested of its American citizenship during its minority, the petitioner was recognized to be an American citizen and properly admitted to this country. This was in accordance with the unquestioned doctrine of *Osborn v. Bank, Supra,* and *U. S. v. Wong Kim Ark, Supra.*

In re Tobiassen, 36 Ops. A. G. 535 and *U. S. v. Reid,* 73 F. (2) 153, (certiorari denied under memorandum specifically stating denial was on grounds petition for certiorari had not been filed within the time prescribed 299 U. S. 544) on which the defendants rely are not in point and in their conclusions are wholly wrong and should be disregarded and overruled, as more fully dealt with below. (See *infra* pp. 42-45; also Editorial Comment by Borchard, 30 Am. Journal Int. Law, 694).

5. Changed Construction and Application of the Law.

As demonstrated above and evidenced by the facts in this case, the predecessors of the defendants adhered to the long established and unquestioned construction of the law that a minor child could not be deprived of

its American birth citizenship by the vicarious act of another.

Obviously this may result in a child acquiring dual nationality, but there are many other circumstances in which persons may be born with or may acquire dual nationality. Dual nationality may have disadvantages, but it is recognized as existing. Dual nationality may cause inconveniences to the Departments, but the remedy for this inconvenience surely is not to deprive our own citizens of their American birth citizenship.

In 1930 the Department of State sent representatives to the International Conference on Nationality and Citizenship. Much of the discussion at that conference pertained to possible methods of avoiding dual nationality. See minutes of Conference in official files of State Dept.; also *Status of Naturalized Citizens* by Mr. Flournoy before National Counsel on Naturalization and Citizenship, April 2, 1937).

Some foreign countries specifically provide by law that when their minor subjects acquire a foreign citizenship they thereupon lose their native citizenship. Other foreign countries give such minors a right of election upon attaining majority. Most others, like ourselves, do not sanction loss or modification of birth citizenship during minority for any reason.

Although no legislative change in our laws followed this conference, the defendants now contend that *because Swedish law* by specific provision operates to divest a minor Swedish child of its Swedish citizen-

ship when it acquires a foreign citizenship by virtue of its parents' naturalization abroad, *as a matter of comity* we should reciprocally hold that a native born American child loses its American citizenship when it has Swedish citizenship conferred upon it. As there is no such provision in our laws, they contend for a novel construction of the Act of March 2, 1907 whereby to hold that a minor child *must be deemed to have expatriated itself* when a foreign citizenship has been conferred upon it under a foreign law.

6. There is no Act of Congress providing for loss of American birth citizenship by a minor child.

It has been demonstrated above that the Act of March 2, 1907 was not intended to, does not, and constitutionally can not, apply to minors who are natural born American citizens.

The defendants do not allege any other act of Congress to divest such children of their birth citizenship, and none in fact exists.

The question of whether or not Congress can divest minor children of so-called "derivative" American citizenship which it has conferred upon them under its legislative power to regulate naturalization must not be confused with the question in this case of whether Congress has the power to tamper with *birth citizenship* established directly under the Constitution. Congress has not attempted to exceed its constitutional bounds, and no such unconstitutional construction as the defendants contend for should be given to its acts.

A native born American citizen who has not attained the age of 21 years cannot renounce allegiance to the United States by any voluntary action of his own, either alone or in conjunction with his father (III. Moore, 715; *Baglivo v. Day*, 28 F. (2) 44). If expatriation cannot be effected by, or on behalf of, a minor American citizen, surely it cannot be inflicted upon him against his will.

The recognition by Congress of the right of natural born American citizens who are *sui juris* to expatriate themselves, and legislative definition of what sort of voluntary affirmative action by the citizen shall be recognized as effecting such expatriation, cannot be construed to constitute a legislative divestment of citizenship from minors by operation of law. As already shown, it does not apply to minors.

7. Constitutionally Congress cannot divest citizens of American birth citizenship.

Congress has only such powers as are delegated to it under the Constitution. With respect to citizenship it has the power to make uniform rules of naturalization (Constitution, Art. 1, sec. 8) as already pointed out (*supra* p. 14). This does not include the power to divest natural born citizens of their constitutionally conferred citizenship. That can be done only by their own affirmative act when *sui juris*. *(Osborn v. Bank, supra; United States v. Wong Kim Ark., supra; Ex parte Chin King, supra; Baglivo v. Day, supra).*

To give the Act of March 2, 1907 the construction contended for by the defendants would render it unconstitutional.

8. *Treaty with Sweden and Norway does not affect plaintiff's American citizenship.*

That the treaty between the United States and Norway and Sweden does not affect natural born citizens of the United States during their minority wherever they may be resident, is best evidenced by setting forth the treaty and the protocol thereto, which are as follows:

BIPARTITE TREATY BETWEEN UNITED STATES OF AMERICA AND SWEDEN AND NORWAY.

Convention signed May 26, 1869; Exchanged June 14, 1871; Proclaimed in United States January 12, 1872.

Article I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens and shall be treated as such.

Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of citizenship legally acquired.

Article II. A recognized citizen of the one party, on returning to the territory of the other, remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration, but not for the emigration itself, saving always the limitation established by the laws of his original country and any other remission of liability to punishment.

Article III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper.

Article IV. The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part, and Sweden and Norway on the other part, the 21st March, 1860, remains in force without change.

PROTOCOL.

The undersigned met today to sign the convention agreed upon in conformity with their respective full powers, relating to the citizenship of those persons who emigrate from the United States of America to Sweden and Norway, and from Sweden and Norway to the United States of America; on which occasion the following observations, more exactly defining and explaining the contents of this convention were entered in the following protocol:

I. Relating to the first article of the convention.

It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence

shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country, shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

II. Relating to the second article of the convention.

If a former Swede or Norwegian who under the first article is to be held as an adopted citizen of the United States of America, has emigrated after he has attained the age when he becomes liable to military service, and returns again to his original country, it is agreed that he remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration, but not for the act of emigration itself, unless thereby have been committed any punishable action against Sweden or Norway, or against a Swedish or Norwegian citizen, such as non-fulfilment of military service, or desertion from the military force or from a ship, saving always the limitation established by the laws of the original country, and any other remission of liability to punishment; and that he can be held to fulfill, according to the laws, his military service, or the remaining part thereof.

III. Relating to the third article of the convention.

It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

The intent not to return to America may be held to exist when the person so naturalized resides more than two years in Sweden or Norway.

9. *Treaty is not self-executory.*

A mere reading of the treaty demonstrates that it is not self-executory. It does not purport to affect the

citizenship status of anyone but merely prescribes the extent to which, and the circumstances in which, each contracting country will recognize citizenship by naturalization acquired in the other country by citizens of the other.

The treaty does not purport to, and does not divest any individual of citizenship in any circumstances; indeed the *treaty* does not even mention renunciation or loss of citizenship.

The protocol, which is not a part of the treaty, expresses circumstances in which a naturalized United States citizen may be held by the United States to have renounced his American citizenship and prescribes that residence in Sweden or Norway for a period of more than two years may raise a *presumption* of such facts.

Such presumption is rebuttable, and has been so held in the only case dealing with the treaty. (*Anderson v. Howe*, 231 Fed. 546 and comments thereon by Mr. Flournoy, 31 Yale L. R. 861; III Moore, 754.) It is evidential only and, until the intent not to return has been properly established *as a fact* either by voluntary statement of the party or by judicial determination, the naturalized citizen cannot be held to have renounced his American citizenship.

Unless United States naturalized citizenship is voluntarily renounced, it continues until the certificate of naturalization *has been cancelled by valid proceedings in Court.* Such judicial cancellation (where no fraud is involved) is effective from the date of the Court's de-

cree, and is not retroactive, and whatever effect it may have on those having so-called "derivative" citizenship, it cannot effect them retroactively as of any date prior to the decree. Even less can it affect a natural born citizen retroactively. (See address of Henry B. Hazard, Esq. (U. S. Dept. Labor) Dec. 29, 1936 before National Council on Naturalization and Citizenship.)

Inasmuch as subsequent legislation supersedes a treaty, however conclusive the two year residence clause might have been when the treaty was ratified, it has been legislatively established as a mere rebuttable presumption by the second paragraph of Section 2 of the Act of March 2, 1907.

The defendants cannot be heard to contend that such a presumption was rebuttable as to the father but not in respect to his minor child; that subsequent to July 25, 1924 the petitioner's father could have rebutted the presumption and retained his naturalized American citizenship, although remaining abroad, but that the plaintiff was precluded by the presumption and must be held to have lost forever her American birth citizenship, although residing in this country. The best way to rebut the presumption of not intending to return is by returning, and the plaintiff stands here before this Court as evidence of her intent to be here.

The defendants err in contending (a) that the citizenship of either the plaintiff or her father was affected directly by the treaty (b) that, even if the treaty could directly affect citizenship, it could or did divest the plaintiff or her father of birth or naturalized

citizenship respectively (c) that residence in Sweden of the plaintiff's father did more than raise a mere rebuttable presumption (d) that such presumption could be availed of to affect citizenship otherwise than in valid Court proceedings (e) that such presumption was not rebuttable as to the plaintiff and that she has not rebutted it (f) that loss of citizenship by plaintiff's father occurred at any time prior to his voluntary renunciation thereof in 1934, or could be made retroactive in any circumstances (no fraud being shown).

10. Treaty does not apply to minor children.

This is one of the so-called "Bancroft Treaties". As in the case of the other "Bancroft Treaties" the principal purpose of this convention was to relieve immigrants from Sweden and Norway who had become naturalized citizens of the United States from liability to military service or punishment for evasion thereof, if they subsequently returned to their native lands as naturalized United States citizens.

It does not purport to apply to minors; it is not self-executory; and whatever its effect, it cannot constitutionally apply to natural born American citizens so as to expatriate them during their minority, for the same reasons as set forth under sub items 6 and 7 above, to which reference is made.

The clause in the protocol that intent not to return to the United States might be deemed renunciation of United States citizenship by naturalization merely expressed the law as construed and the two year clause

merely specified the period which might raise a presumption of such intent on the part of naturalized adults and obviously is not applicable to natural born American minors. It did not alter the necessary legal procedure in any respect.

To hold that a natural born American citizen can be deprived of his American citizenship as contended by the defendants would be unconstitutional under the Due Process Clause of the V Amendment which in that respect provides:

> "No person shall be * * * deprived of life, liberty, or property without due process of law"

as well as under Section 1 of the XIV Amendment (*supra*, p. 11).

Similar provisions in other "Bancroft Treaties" were construed very soon after their ratification as not in any way affecting the natural born citizenship of children whose parents were affected thereby. See numerous cases of that effect in III Moore's International Law Digest, 749 *et seq*, and especially at p 754; and *Steinkauler's Case*, 15 Ops. A. G. 15.

11. Treaty cannot transcend the constitution.

American citizens cannot by treaty with a foreign power be divested of constitutional rights which Congress has not the power to alter by legislation; nor can Congress legislate to that effect under treaty provisions.

The plaintiff refrains from going into this question in detail in this Brief, but will enlarge hereon if the Court desires or if the defendants contest this premise.

12. Plaintiff never became naturalized in any foreign country.

Even if the defendants be correct in their contention that under the Act of March 2, 1907, a *minor child* could be "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws" the plaintiff submits she has never been so naturalized in any foreign country.

Specifically the plaintiff denies that she ever became a naturalized Swedish citizen, or in any way acquired Swedish citizenship.

Furthermore, "naturalization" as used in the Act of March 2, 1907 connotes acquisition of citizenship by voluntary affirmative action by the person naturalized and not merely by operation of law upon that person. This distinction is evidenced by the fact that in section 5, as amended, of that Act "naturalization" and "resumption of citizenship" are used in contradistinction to each other to designate *different* methods of acquiring citizenship. Similar distinctions appear elsewhere in that and other acts.

The legislative history of the act (see *supra*, p. 20) also bears evidence to the fact that in "naturalization" Congress was contemplating acquisition of citizenship by the well recognized voluntary procedures provided by the laws of this and most foreign countries, and not by operation of law as a result of circumstances beyond the control of the person affected.

Swedish law makes the same distinction. The Swedish Citizenship Act of 1894 provides for the *acquisi-*

tion or resumption of Swedish citizenship in certain circumstances by operation of law. *"Naturalization"* is something else, as Article 4 of that Act clearly demonstrates in providing:

> "Swedish citizenship *shall also be acquirable by naturalization in the manner and under the conditions that have been prescribed in a Special Law.* Naturalization of an alien man shall carry with it Swedish citizenship for his wife and for his children if legitimate and under age, unless a decision to the contrary is made at the time." (Italics ours.)

The special law here referred to, Royal Ordinance of February 27, 1858, under Article 2 provides a naturalization procedure quite similar to that of the United States, predicated upon an application duly filed (Article 1) showing that the applicant is twenty-one years of age, of good moral character, has been domiciled in Sweden for three years and has the means of supporting himself. Article 4 requires due proof of expatriation from the applicant's country of origin and the taking of the oath of allegiance to Sweden.

Thus it is clear that even if the plaintiff had Swedish citizenship conferred upon her as alleged by the defendants (which she denies) she did not thereby become *naturalized* in the sense that phrase is used in the Act of March 2, 1907.

13. Plaintiff's father did not acquire Swedish nationality under Swedish laws on July 25, 1924.

Assuming that the plaintiff's father (and mother) lost his (and her) Swedish citizenship under Article 5

of the Swedish Citizenship Act of 1894, upon becoming naturalized in the United States, it is clear that he did not regain his Swedish citizenship during plaintiff's minority under Article 8 (or any other article) of that Act.

The treaty with Norway and Sweden is not self-executory, and acquisition and loss of citizenship in the several countries must depend upon the domestic laws of those countries. At most, the treaty raises a mere rebuttable presumption of intent which may be pleaded as evidence in a legal action, but must be established as a fact to affect the citizenship status of the person involved.

From the record it appears that no legal proceedings were ever instituted to cancel or rescind the United States naturalized citizenship of the plaintiff's father; nor were legal or official proceedings taken in Sweden to reëstablish his Swedish citizenship at any time during plaintiff's minority nor prior to November 13, 1934. Therefore he in fact retained his American citizenship at least until he voluntarily surrendered his certificate of naturalization and renounced allegiance to this country on November 13, 1934.

Under Article 8 of the Swedish law prior loss of the adopted citizenship is a *condition precedent* to regaining Swedish citizenship. The plaintiff's father had not lost his United States citizenship on July 25, 1924 as the defendants contend, therefore he could not have reacquired Swedish citizenship on that date under Swedish law.

The defendants expressly disclaim that the second paragraph of Section 2 of the Act of March 2, 1907, has any bearing on the citizenship status either of the plaintiff or of her father *(Exhibit H-4)*, and as the treaty is not self-executory, there seems to be no basis for holding that the plaintiff's father lost his Naturalized American Citizenship except by voluntary renunciation in 1934. Consequently he could not have acquired Swedish Citizenship prior to 1934 and the plaintiff could not thereby have acquired Swedish citizenship during her minority.

14. The plaintiff did not acquire Swedish citizenship under Article 8 of the Swedish Citizenship Act of 1894 as contended by the defendants, nor indeed under any other article or any other act.

If it should be held however that plaintiff's father did acquire Swedish citizenship during her minority, to wit, on July 25, 1924, as alleged by the defendants, nevertheless the plaintiff did not acquire Swedish citizenship as she fell within one of the specifically excepted classes.

Article 8 of the Citizenship Act provides that:

> "If Swedish citizenship is recovered by a husband * * * Swedish citizenship shall also accrue to his * * * children who are under age, *unless* * * * they are not resident in Sweden at the time when the husband and father recovers Swedish citizenship *or have not lost along with him citizenship in the foreign country.*" (Italics ours.)

The two exceptions preventing the acquisition of Swedish citizenship by minor children are in the alter-

native. In the instant case, while the plaintiff may have been resident in Sweden on July 25, 1924, she did not lose her American citizenship "along with" her father, or at any other time, and therefore she could not have acquired Swedish Citizenship under Article 8.

The defendants cannot be heard to contend that the plaintiff lost her American citizenship *because* she acquired Swedish citizenship, as she could not have acquired Swedish citizenship unless she had first or simultaneously lost American citizenship.

It is submitted that the loss of American birth citizenship should not depend upon a departmental interpretation of a foreign law, especially where there has been no voluntary and affirmative act on the part of the American citizen to be so affected.

The plaintiff further submits that the legal residence of a child cannot be changed to the child's detriment during its minority and that as she was a legal resident of the United States, she was not, *in contemplation of law,* resident in Sweden at any time during her minority. Therefore she fell within both exceptions and could not have acquired Swedish citizenship.

15. Cases cited by defendants not in point.

The cases cited in the Courts below by the defendants except the Reid case had nothing whatsoever to do with loss of *American* citizenship. They merely hold that under our law when an alien becomes naturalized in the United States our law naturalizes along with him his minor children residing with him. Our

law does not purport to divest the minor children so naturalized of their alien birth citizenship, nor even make the conferring of American citizenship contingent upon their loss of their alien citizenship. As far as our law is concerned they may all have dual citizenship thereafter.

Where, however, the law of the child's country of origin provides that when its subjects, being minors, acquire citizenship of another country by virtue of their parents' naturalization there, they shall forfeit their citizenship of origin (as for example Swedish Citizenship Act of 1894, Art. 5), then we can properly require that upon acquisition by children of such "derivative" United States citizenship the country of origin shall hold *under its own law* that they have lost their citizenship of origin. That merely constitutes due protection of our citizens abroad in full conformity with the foreign law of their country of origin.

This is as far as the cases go. United States law does not provide for loss of United States birth citizenship by minors upon having a foreign citizenship conferred upon them, and indeed the laws of many countries do not provide for such loss of citizenship of origin merely upon having another citizenship conferred upon the child. The defendants' argument for reciprocity in this respect is carrying the Golden Rule too far and is clearly contrary to our Constitutional and Statutory law, and in effect proposes that the retention of United States citizenship shall be contingent upon the laws of the country in which any citizen happens to be for the time being.

The Act of May 24, 1934 cited by the defendants below can have no possible bearing upon whether or not the plaintiff lost her American Citizenship ten years before its enactment. Besides the act deals with children born outside the United States of alien parents, and does not even purport to relate to native born citizens.

16. Analysis of Tobiassen Opinion, 36 Op. A. G. 535.

The plaintiff contends that the Opinion of the Attorney General in the Tobiassen case was erroneous for substantially the same reasons that she contends the defendants err in this case. But in addition to this, the opinion was predicated on an erroneous or incomplete statement and consideration of the facts.

Ingrid Tobiassen, as appears in the opinion, was born in the United States of Norwegian parents, and therefore acquired at birth both American citizenship under the XIV Amendment to the Constitution and Norwegian citizenship under Section 1 of the Norwegian State Citizenship law of April 21, 1888, as amended (See U. S. House Doc. Vol. 72, No. 326, 59th Congress, 2nd Session, 1907, p. 473).

The opinion, although stating the circumstances of her birth, completely ignores the important fact of her dual United States and Norwegian nationality, and that she never lost her Norwegian citizenship acquired at birth.

The opinion states that after her birth her father became a naturalized citizen of the United States and

thereupon lost his Norwegian citizenship under Norwegian law. (This is presumably correct, under Section 6 (a) of the Norwegian law.) However, Miss Tobiassen's dual nationality was in no way affected by her father's naturalization. She already had American birth citizenship, therefore she did not acquire "derivative" citizenship by virtue of her father's naturalization here; and as she did not thereby acquire any new citizenship, she did not lose Norwegian citizenship under Section 6 (a), or any other section, of the Norwegian law.

Norwegian law does not provide for loss of Norwegian citizenship by a minor child merely upon *loss* of Norwegian citizenship by its father, but *only* where the child *acquires* a foreign citizenship by virtue of its father acquiring such foreign citizenship (Section 6 of the Norwegian law).

Consequently when Miss Tobiassen during her minority was taken by her father to Norway, even assuming that he became repatriated as stated in the opinion (which is highly doubtful on the facts as stated) her dual nationality was in no way affected thereby. She already had Norwegian citizenship by birth, therefore she did not *acquire* Norwegian citizenship by virtue of his repatriation under Section 2(b), or any other section, of the Norwegian law and therefore as she did not thus become naturalized in a foreign country in conformity with its laws, she did not lose her American birth citizenship under Section 2 of the Act of March 2, 1907, even under the defendants' theory, which is predicated upon *acquisition* of a foreign citizenship. This most important fact the opinion completely ignores.

Miss Tobiassen, therefore, was properly admitted to the United States during her minority on her birth certificate and there was no basis whatsoever for contending otherwise even on the defendants' theory of vicarious expatriation during minority.

To support its contentions in the Tobiassen dispute, the State Department relied on an unauthenticated opinion of the Norwegian Foreign Office that Miss Tobiassen had acquired Norwegian citizenship by virtue of her father's reacquisition of Norwegian citizenship. The facts upon which that opinion was based do not appear, but there is no evidence that they were any more accurate than those on which the Attorney General's opinion was predicated.

Thus the Opinion of the Attorney General in the Tobiassen case is predicated upon the erroneous assumption that Miss Tobiassen did not have Norwegian citizenship when she was taken to Norway during her minority; that her father in fact reacquired Norwegian citizenship the *very day* he returned to Norway; that he thereby *eo instanta* renounced his American naturalized citizenship and expatriated himself (in spite of statutory prohibition of such expatriation while a state of war existed, as it did at that time); and that she *acquired* Norwegian citizenship by virtue of her father's repatriation, which obviously she did not.

Predicated entirely upon gross error and inaccuracy, the opinion cannot be anything but erroneous.

Even if the facts had been as assumed in the opinion, the conclusion is wholly wrong. Reference is made

to comments in the opinion of Judge Fee in the District Court in *Reid v. U. S.*, 6 Fed. Supp. 800.

The opinion is so patently erroneous from every angle that it cannot be said to stand for anything.

17. *Analysis of the Reid Case (Reid v. U. S.*, 6 Fed. Supp. 800; *U. S. v. Reid*, 73 Fed. (2) 153; *Reid v. U. S.*, 299 U. S. 544).

Following the opinion of the Attorney General, *In re Tobiassen*, 36 Ops. A. G. 535, and relying principally thereon, the Labor Department opposed the repatriation under the Cable Act of Mrs. Arla Marjorie Reid, contending that she had lost her American birth citizenship, not, as she alleged, by marriage to an alien prior to the Cable Act, but rather by virtue of her father's naturalization in Canada during her minority.

In the District Court Judge Fee scathingly criticized the Tobiassen opinion, upheld the applicant's contentions and declared her an American citizen (*re Reid*, 6 Fed. Supp. 800).

The government appealed. Mrs. Reid was not represented by counsel. In the Circuit Court of Appeals Government Counsel introduced as *new evidence* to prove what they contended was the long established construction of the law, unauthenticated quotations of portions of an unpublished, inter-departmental communication of October 7, 1931 from the State Department to the Attorney General relative to the Tobiassen controversy then pending. Such evidence was clearly inadmissible: it was gross and reversible er-

ror on the part of the Court to allow its admission. From its very nature it was not probative, but merely presented the arguments of the State Department in a highly controversial dispute then pending, concerning which the Labor Department (whose opinion carries as much weight as the State Department) took exactly the opposite view.

Yet, instead of protecting the rights of the respondent, Mrs. Reid, and excluding such improper evidence, the Court practically rested its opinion on the statements in that letter, quoting long portions to support its decision in which it reversed the District Court and sustained the new interpretation of the law. *U. S. v. Reid*, 73 Fed. (2) 153.

It is submitted that the statements in the letter of October 7, 1931, concerning the long established practice of the State Department are inaccurate, misleading and contrary to the facts as they have been shown to exist.

Mrs. Reid, unrepresented by counsel and without funds to carry on litigation, failed to petition the Supreme Court of the United States for certiorari within the time prescribed. However, in November, 1934, Mrs. Barney and Mrs. Carr petitioned for leave to appear *amici curiæ* and to file a motion for a rehearing and a brief. Their petition was held for over a year and on January 13, 1936, leave to file such a motion and brief was granted. The government filed a brief in opposition and five months later, on June 8, 1936, the motion for rehearing was denied on the merits. Within ninety days thereafter, in Septem-

ber, 1936, Mrs. Reid filed a petition for certiorari, contending that the motion for rehearing filed by Mrs. Barney and Mrs. Carr had extended the time within which the principal contestant could petition for certiorari. This Court, however, in a memorandum held the time for petition for certiorari had expired, and for that reason denied certiorari (*Reid v. U. S.*, 299 U. S. 544). Such denial of certiorari does not appear to constitute affirmance of the decision of the Circuit Court of Appeals.

18. Legislative intent is not to expatriate native-born citizens.

The general intent of Congress evidenced by the consistent trend of legislation to preserve birth citizenship except in cases where the citizen unequivocally casts it off and to facilitate repatriation of our native born citizens who for some reason other than voluntary and affirmative renunciation of allegiance to this country are deemed to have lost their United States citizenship, is contrary to the interpretation here sought by the defendants. Thus, in Section 3 of the Act of March 2, 1907, by which Congress provided "That any American woman who marries a foreigner shall take the nationality of her husband", it also provided for her repatriation either at home or abroad upon the termination of the marital status.

Although this Court held marriage to be a voluntary and intentional act which could constitute expatriation (*Mackenzie v. Hare*, 239 U. S. 299), Congress apparently concluded it was not a customary act of ex-

patriation, was contrary to the policy of this country and consequently in 1922 by the Cable Act it definitely repealed that provision and specifically declared that a woman citizen of the United States shall not cease to be such a citizen solely by reason of her marriage (unless she should marry an alien ineligible to citizenship) although during continuance of the marriage she should be subject to the same presumption of expatriation arising from residence abroad, as in respect to naturalized citizens; it also provided for the repatriation of women who had lost their citizenship by marriage under the prior Act (Act of September 22, 1922, 42 Stats. 1021-1022). In 1930 Congress amended the Cable Act by repealing the part of Section 3 providing for presumptive expatriation arising from residence abroad (Act of July 3, 1930, 46 Stats. 854). In 1931 Congress further amended this section by repealing the provision with reference to marriage to an alien ineligible to citizenship and modified the requirements for repatriation (Act of March 3, 1931, 46 Stats. 1511). Again in 1936 Congress amended the Cable Act further to facilitate repatriation of native born women who had lost or were believed to have lost their citizenship by marriage prior to 1922. (June 25, 1936, 49 Stats. 1917.)

In legal contemplation married women and children have been deemed to be under certain disabilities in consequence of which they have been an especial charge of the courts and the legislature. It is difficult to believe that Congress could have been so solicitous for the reacquisition and retention of United States citizenship by women who voluntarily marry foreigners and live abroad and yet so willing to expatriate and debar from this country native born children who, legally incapable

of performing a voluntary act of expatriation, have been taken abroad by their parents, but now seek to live here as citizens.

Congress also made provision for speedy repatriation of former American citizens who served in the Allied armed forces during the World War and who had been required to take an oath of allegiance to such foreign government, whereby, under the Act of March 2, 1907, they would be deemed to have expatriated themselves from the United States. There are numerous instances where Congress has modified requirements so as to facilitate naturalization of foreign born aliens who fall into certain preferred classes.

The absence in the past of any such remedial legislation for the repatriation of native born citizens of the United States who during minority were expatriated, and the introduction in the present session of Congress and the session just concluded of several such remedial bills are further evidence that until the change in the administrative interpretation and application of the law following the unfortunate decisions in the *Reid* and *Tobiassen* cases (*supra*) it was not supposed by anyone that a natural born United States citizen could be expatriated during minority.

The defendants on page 13 of their petition for certiorari cite and quote the *private* act of June 25, 1938 for the benefit of Albin H. Youngquist (Private No. 751, 75th Cong., 3rd Ses., introduced as S. 3633) as an indication of legislative intent with reference to expatriation of minor children. As this is a private act, it is no indication of legislative intent with reference to public

acts. The legislative branch of the government cannot make judicial determinations, and the conclusions expressed in this act, as well as those expressed in the report of the Senate Committee which accompanied the bill (75th Cong., 3rd Ses., S. Rep. 1316 to accompany S. 3633) are obviously predicated on administrative interpretation as expressed in the letter of March 24, 1938 from James L. Houghteling, Commissioner of Immigration and Naturalization, to Honorable Richard J. Russell, Jr., Chairman of the Committee, which was incorporated in the report and is as follows:

IMMIGRATION AND NATURALIZATION SERVICE,
Washington, March 24, 1938.

Hon. RICHARD B. RUSSELL, JR.,
United States Senate, Washington, D. C.

MY DEAR SENATOR RUSSELL: This will acknowledge receipt of your letter of March 10, enclosing for comment and recommendation by this Service Senate bill No. 3635,* authorizing the naturalization of Albin H. Youngquist, and for other purposes.

The records of this Service show that Youngquist was born in the United States in Beadle County, S. Dak., on December 28, 1907, and last entered the United States from Canada at Portal, N. Dak., on January 8, 1931, at which time he was apparently admitted as a United States citizen.

Accompanied by his parents, Youngquist proceeded to Canada in 1908, and his father, who is a native of Sweden, became a naturalized citizen of Canada in 1912. The action of the father in becoming a citizen of Canada had the effect of investing the son with that citizenship, and Albin Youngquist therefore lost his United States citizenship under section 2 of the act of March 2, 1907. Consequently, when he last entered the United States in 1931, he had the status of an alien and

*This reference should be to Senate Bill No. 3633.

was therefore subject to the general requirements of the immigration law.

Youngquist attempted to return to Canada on October 13, 1932, and again on December 7, 1933, but was denied admission on both occasions by the Canadian authorities. He was made the subject of deportation proceedings in March 1937 and, although found to be deportable, the Department directed that he be granted permission to depart voluntarily to any country of his choice, with the further direction that he be granted a preexamination and furnished a letter to the Canadian authorities, guaranteeing his readmission to the United States in the event that after his arrival in Canada the American consul to whom he would make application for a visa should refuse such a document. His parents are residing in Rama, Saskatchewan, Canada.

So many cases similar to that of Mr. Youngquist have arisen that Senator Thomas, during the last session of Congress, introduced a bill (S. 1169) entitled "A bill to clarify the expatriation laws with regard to certain native-born citizens of the United States, and for other purposes," and no steps are being taken to enforce the departure of Mr. Youngquist or other aliens in a similar status pending action by Congress on the bill in question.

While we interpose no objection to favorable action on Senate bill 3633, we are of the opinion that, in view of the considerable number of similar cases now pending before this Service, it would be to the best interest of all concerned to give favorable consideration to Senate bill 1169, introduced by Senator Thomas at the last session of Congress, provided this bill is still on the calendar.

Please return the enclosed file when it is no longer needed by your committee.

Cordially yours,

JAMES L. HOUGHTELING,
Commissioner.

Although the Commissioner's conclusions may express the administrative point of view, if the plaintiff is correct in her contention that a native born citizen cannot be expatriated during minority under the Act of March 2, 1907, then the Commissioner's conclusions are clearly in error.

It should also be noted that under the law of Canada in effect when Youngquist was taken into Canada and when his father became naturalized, minor children were not fully naturalized with their parents but Canadian citizenship was conferred upon them *only while within Canada.* (Law of Canada, Chap. 77, Revised Statutes for 1906). It is apparent therefore (as was submitted to this Court in the petition for certiorari of Arla Marjorie Reid, October Term, 1936, No. 352) that such persons are not deemed citizens when outside of Canada. That this is the view taken by the Canadian officials is undeniably evidenced by statements in the Commissioner's letter that Youngquist was on two occasions and within a short time after his return to the United States denied admission to Canada; had he been a naturalized Canadian citizen, Canada could not have refused him admission. Surely Congress never intended that the acquisition of such a limited citizenship should effect the expatriation of a native born child.

Furthermore (as pointed out in the *Reid* petition) at the date of Youngquist's alleged naturalization, as well as at the date of Mrs. Reid's alleged naturalization, naturalized Canadians did not become British Subjects, but were *aliens* in Great Britain, and therefore could not be embraced in our treaty of 1870 with Great Brit-

ain (see *Ex parte Markwald* (1918), 1 K. B. 617, and *Markwald v. Attorney General* (1920) 1 Ch. 349).

It is also interesting to note the Commissioner's recommendation that favorable consideration be given to S. 1169 entitled *A bill to clarify the expatriation laws with regard to certain native born citizens of the United States, and for other purposes*, which provided that no native born citizen could be expatriated during minority, and his statement that pending action by Congress on that bill, neither Mr. Youngquist nor other aliens in a similar status were being deported.

The letter of the Solicitor of the Labor Department to the Attorney General set forth as Appendix B to the defendants' petition shows the number of such cases.

19. No limitation to defendants' doctrine.

If the defendants prevail in their contention there would appear to be no limitation to the extent to which native born American citizens might be arbitrarily expatriated by act of Congress or by treaty with a foreign power. If a minor child can be so expatriated as a result of the non-act of a parent (as in this case the record shows no voluntary act of expatriation on the part of the plaintiff's father) then there is nothing to prevent Congress from expatriating any American born citizen for any reason, however frivolous. American citizens have rights, and those rights can not be bartered away unnecessarily even by their Government. They are not subjects or slaves, but free citizens whose life, liberty and property, is guaranteed perpetually. In the Court of Appeals in the course of argument the defendants contended that as a result

of a parent's naturalization in a foreign country a minor child who had been born in, and was continuing to reside in the United States could be held to have been divested of its birthright of citizenship, and thereafter deported as an alien, although it had never been out of this country. This is the logical direction in which their doctrine carries them.

If the mere conferring of a foreign citizenship, in conformity with the laws of such foreign state and in accordance with the terms of a treaty lightly entered into, and under no compulsion, is to effect expatriation and/or deportation from the United States, regardless of the wishes of the individual, then any foreign government might by treaty and the enactment of laws conferring its citizenship upon any class of American citizens, within or without its territory and jurisdiction, effect the involuntary expatriation of such class, and when such persons are found in the United States our officials would be in duty bound to deport them and send them abroad possibly for military service, or to suffer a worse fate in a dictatorship or communistic state. This suggestion, although sounding fantastic, would not exceed the scope of the doctrine contended for by the defendants. In fact this Government could agree, in times of peace, by treaty to sell Alaska to Russia, and agree that all its inhabitants, regardless of their American birth, should become citizens of the U. S. S. R., thus exiling them from their native land forever.

But such arbitrary action is not within the power of Congress by legislation or by treaty. Even though there be no absolute constitutional prohibition against the involuntary expatriation of native born citizens it

appears to be a matter of public law in a Democracy, too obvious to necessitate express constitutional or legislative mention, that the persons comprising the component part of this nation—the citizens of the United States—cannot be cut out from that membership involuntarily, expatriated and deported against their wishes to a foreign country, when accused of no crimes against the nation or their fellow citizens, and in the absence of some compelling reason therefor. The Government cannot effectuate a treaty which is contrary to the spirit of the Constitution. (*Dred Scott Case, supra; Downes v. Bidwell*, 182 U. S. 244, 282, 283, 291, 298).

While conditions are conceivable under which a Treaty involuntarily expatriating a class or classes of native born citizens might be sustained as Constitutional, its language would have to be wholly unambiguous, and it would have to be shown conclusively in support of such a treaty that such action was required by some impelling cause such as the necessity of doing so to preserve the Independence and territorial integrity of the rest of the Nation. No reason whatsoever had been advanced in this case for depriving the plaintiff of her guaranteed birthright. Certainly there is no suggestion that the Nation or its best interests would be imperilled by permitting her and others similarly situated to retain their citizenship, and continue to live in the land of their birth. Such an arbitrary exercise of the treaty making power directly contrary to the spirit of the Constitution, and depriving citizens of every personal right is clearly unconstitutional.

III.

This Court has power to grant and should have granted the relief sought against defendant Hull; such relief does not involve the exercise of judgment and discretion by the defendant Hull.

Undoubtedly the issuance of a passport to an American citizen rests in the sound judgment and discretion of the Secretary of State, and the courts will not interfere by injunction to prevent, or mandamus to compel, such issuance. However, judgment and discretion of the Secretary of State are not involved in the case at bar, the issue is simply jurisdictional.

In the instant case the defendant Hull has determined the plaintiff is not an American citizen and therefore that he has no jurisdiction to issue a passport to her. (See letter from Chief of Passport Division to petitioner, dated July 29, 1936, concluding "in view of the foregoing, the Department *is obliged to say that, as you cannot be considered to be a national of the United States, a passport cannot be issued to you.*" (Italics ours.) *Ex. H-1, R. 15*).

The courts can and will entertain cases to determine whether an executive officer has jurisdiction of the matter in issue and by appropriate action will enjoin him from taking, or compel him to take, jurisdiction of the case, without, however, decreeing how he shall exercise his sound judgment and discretion or what action he shall take in the matter. If the plaintiff is an American citizen, then the defendant Hull errs in denying that he has jurisdiction to issue an Amer-

ican passport to her; although whether or not he will issue such passport may then rest in his sound judgment and discretion.

There is a long line of cases sustaining this proposition, commencing with *Decatur v. Paulding*, 14 Peters 497 (1840) and continuing to March 29, 1937, when in the *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, Mr. Justice Stone said:

> "It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, *United States ex rel. Greathouse v. Dern*, 289 U. S. 352, 359, to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority. *Interstate Commerce Commission v. Humboldt S. S. Co.*, 224 U. S. 474; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638; see *Work v. United States ex rel. Rives*, 267 U. S. 175, 184; *Wilbur v. United States, ex rel. Kadrie*, 281 U. S. 206, 218."

As above set forth, the issue in this case does not involve the exercise of sound judgment or discretion by the defendant Hull, but a question of jurisdiction which properly comes within the purview of this Court.

While the Secretary of State may be immune from judicial scrutiny respecting acts properly done by him in the exercise of his sound judgment and discretion, that does not constitute a general immunity with reference to acts which are illegal, arbitrary and beyond his power and authority or which are based, not on his sound judgment and discretion, but upon his erroneous conclusion of law.

There is no basis in the cases, the statutes or in the public interest for contending that a Declaratory Judgment should not issue respecting a controversy in which the Secretary of State is involved simply because he is a necessary party, particularly where the point in issue does not involve the exercise of his sound judgment and discretion. Indeed, a Declaratory Judgment is the very proceeding which should be employed in such matters as affording a means for correcting illegal, erroneous or arbitrary acts by the Secretary of State without interfering with the proper exercise of his sound judgment and discretion. (See *Federal Declaratory Judgments Act*, printed as Appendix A to this brief, *infra* p. 67).

The official pronouncement by the Secretary of State that the petitioner is not a United States citizen involves far more than the mere refusal to issue a passport; it illegally deprives her of all diplomatic protection at home and abroad to which a citizen of the United States is entitled as a matter of right and which does not rest in the judgment and discretion of any executive officer.

The Courts may very properly refrain from interfering by mandamus or by mandatory injunction with the issuance of passports to United States citizens by the Secretary of State, as that presumably involves the exercise of sound judgment and discretion reposed in him. However when the Secretary of State usurps the power of the Court and standing solely upon an administratively changed interpretation of the law (*Exhibits B-3* and *B-4* R. 10, 11) contrary to a long line of decided cases, purports to determine and hold that a natural born United States citizen has lost

her United States citizenship during her minority as a result of a foreign law and has thereby become an alien and coincident to such conclusion declines to issue a passport as being without his jurisdiction to do so (also necessarily depriving her of all diplomatic protection at home and abroad) it is high time the Court stepped in.

This is the very type of *case* intended to be benefited by the Federal Declaratory Judgments Act, and that is the very type of *remedy* appropriate to this sort of controversy.

A Declaratory Judgment adjudicating the fact that the petitioner is a citizen of the United States will not interfere with the exercise of judgment or discretion on the part of the defendant Hull, but will dispel his erroneous conclusion that he has no jurisdiction of the matter and will establish the petitioner's right to all the rights, privileges and protection of a United States citizen at home and abroad, which do not rest in the judgment and discretion of any executive officer.

In these days of advancement such a progressive remedy, free from coercion, should be welcomed and not be objected to by the executive branches of the Government.

IV.

An actual controversy within the meaning of the Federal Declaratory Judgments Act between the petitioner and the defendant Hull clearly exists in relation to the making of statements by said defendant impugning the petitioner's American citizenship.

A United States citizen has the right not to have his citizenship denied or impugned by a public servant.

Official and public utterances by an executive officer purporting to determine and state that such United States citizen has expatriated himself by operation of foreign and domestic law, necessarily resulting in depriving him of his rights and privileges as an American, causing him inestimable and irreparable damage, and subjecting him to threats of arrest and deportation, clearly constitute an actual controversy within the meaning of the Federal Declaratory Judgments Act. (*Aetna v. Haworth*, 300 U. S. 227; *Columbian Ins. v. Foulke*, 89 F. (2) 261).

The defendant Hull is the executive officer to whom other officers of both the Federal and State Governments look for information concerning nationality and citizenship status of persons.

Statements by the defendant Hull that the plaintiff is not a United States citizen have the weight of official utterances and constitute more than the mere expression of opinion. Such statements are intended by the defendant Hull to have, and do have, the weight and dignity of official decisions with other officers of the Government. In the case at bar, his expressed opinion and utterances constitute an invasion of the plaintiff's right, as an American citizen, not to have such damaging statements, unfounded in fact or in law, made and published about her by a public servant. They result in directly interfering with the plaintiff's rights, depriving her of the diplomatic protection at home and abroad to which, as an American citizen, she is entitled, and in setting in motion machinery which, unless checked, will result in further actual invasion and interference with her rights, her liberty and her personal freedom.

The controversy, therefore, between the plaintiff and the defendant Hull with respect to his refusal to issue her a passport involves a jurisdictional question, justiciable by the courts, which have not infrequently decided such issues, compelling an executive officer to assume jurisdiction of a matter, although leaving his decisions and acts to his sound judgment and discretion.

V.

An actual controversy exists between the petitioner and the defendants Perkins and Shaughnessy.

The decision of this Court in *Aetna Life Insurance Co. v. Haworth*, 300 U. S. 227, in an opinion handed down by Mr. Chief Justice Hughes, reversed the decisions below and clearly establishes that on facts as shown in the case at bar an actual controversy exists between the plaintiff and the defendants Perkins and Shaughnessy and that the issue here involved is of the precise nature intended to be justiciable under the Federal Declaratory Judgments Law. (See Appendix *A infra*, p. 67).

The facts in the case at bar come squarely within the scope of the *Aetna* decision. In the *Aetna* case the defendant filed written claims against the plaintiff; in the instant case these defendants filed written notices on the plaintiff that they had determined she was an alien, that she was improperly in the United States and that it would be necessary for her to depart therefrom *(Exhibits F-1 and H-1, R.* 13, 15). In neither the *Aetna* case nor the case at bar have the defendants instituted actions wherein the plaintiffs could prove their non-liability, although in each case it was

within the power of the defendants to do so and the plaintiffs in both cases have been living under the continual threat of such suits. The case at bar involves an actual controversy fully as much as the *Aetna* case; the Court has construed "cases of actual controversy" broadly, holding they are not limited to traditional forms or traditional remedies. In the case at bar there is clearly an actual controversy between the plaintiff and the several defendants as to whether or not she is an American citizen.

This issue does not involve a mere difference of opinion, upon hypothetical facts, but a controversy threatening the liberty, rights and privileges of the plaintiff upon actual facts. As in the *Aetna* case, so here, the controversy involving the nationality of the plaintiff is justiciable and admits of special relief through a conclusive decree.

As expressed in the *Aetna* case the nature of this controversy and not the method of presenting it, is determinative of whether a suit for Declaratory Judgment will lie.

The plaintiff's alleged right to be immune from the threats, interferences and claims of the defendants is a "right" within the meaning of the Declaratory Judgments Act. (*Columbian Insurance Co. v. Foulke*, 89 F. (2) 261, C. C. A., 8th Circuit).

Thus, in the case at bar, it is clear that a controversy exists concerning the plaintiff's American citizenship. It is not necessary that she wait until the defendants cause her to be arrested preparatory to attempting to deport her or until she has been charged with a pur-

ported breach of the peace for committing some act prohibited to aliens, though lawful to United States citizens, before her nationality can be determined and she can be judicially apprised of her legal rights.

The cases cited by the defendants have either been reversed by the Supreme Court of the United States or are not in point and are not controlling of the present situation. Reference is made to the analysis of those cases and remarks concerning and distinguishing them by the Chief Justice in his opinion in the *Aetna* case.

VI.

Statutory and substantive law authorize granting of Declaratory Judgment in this case; the case has been properly brought; the District Court has jurisdiction of the case and of the parties.

That the District Court has jurisdiction of this suit seems hardly to require argument. That Court has jurisdiction over the several defendants; it is the proper Court in which to commence an action against them and they have appeared; it has jurisdiction of citizenship and nationality matters such as constitute the sole issue here involved, and it has power to grant the relief prayed for; no other Court has prior jurisdiction; all elements essential to jurisdiction exist and no element which would deprive the Court of jurisdiction exists. This is an appropriate case for relief by way of a Declaratory Judgment, *Aetna v. Haworth*, 300 U. S. 227; *Columbian Ins. Co. v. Foulke*, 89 F. (2) 261.

There is no plain, adequate and complete remedy at law and even if there were, that fact would not deprive

the plaintiff of her right to a declaratory judgment. There is no proceeding at law by which the plaintiff can obtain an adjudication that she is a United States citizen and can be relieved from the invasion and denial of her rights and privileges by these defendants, and from the harassments to which they are continuously subjecting her.

Habeas corpus proceedings are not available to the plaintiff at this time. In order to make them available she, herself, would have to request that an order of deportation and a warrant for arrest be issued against her (thus greatly prejudicing her own case) and would then have to submit to arrest and go through the process of being confined while bail bond was being obtained and thus bring up the case in a most unsatisfactory manner.

In any event, *habeas corpus* is not an adequate remedy at law where no order of arrest has been issued because it is not existent at the time and no remedy is adequate within the meaning of statutory and substantive law to defeat equitable jurisdiction unless the plaintiff can step immediately out of one proceeding into the other—which the petitioner cannot do in this case.

> "It is not enough that there be a remedy at law, it must be as plain and adequate, as practical and efficient to the ends of justice and its prompt administration as a remedy at equity." Jones Manual of Equity Pleading Practice, p. 9.

The defendants Perkins and Shaughnessy have notified the plaintiff that she is not an American citizen, that she is remaining in this country illegally and that she must leave this country.

The defendants Perkins and Shaughnessy *must* take steps to deport aliens illegally remaining in this country. Therefore their official allegations of the plaintiff's alienage and notice to her to leave the United States constitute an actual threat of deportation which they must be expected to prosecute unless relief is granted as prayed for. This threat of deportation remains unretracted, the defendants Perkins and Shaughnessy having from time to time merely postponed the time for taking further proceedings against the plaintiff. The plaintiff's prayer for a temporary injunction *pendente lite* was dismissed upon the defendants through their counsel, stating in open Court that no steps toward her deportation would be taken pending the outcome of this suit.

However, the absence of plain, adequate and complete remedy at law is no requirement of the Federal Declaratory Judgments Act. She is entitled to a declaration of her status regardless of any other remedy available to her. *Nashville v. Wallace*, 288 U. S. 249, 258 (Declaratory Judgment issued although plaintiff has a remedy at law in State Court).

Gully v. Interstate Natural Gas, 82 F. (2) 145, C. C. A. 5th.

Penn v. Glenn, 10 F. Supp. 483 (Ky.) (Declaratory Judgment issued although injunction denied as adequate remedy at law).

If the plaintiff's right to a Declaratory Judgment should be denied, then she would pray for injunctive relief against the defendants, as set forth in her petition; however, such injunctive relief is unnecessary if the decree of the District Court is sustained, and consequently it is not enlarged upon in this brief.

Conclusion.

In conclusion the plaintiff submits that she is a natural born citizen of the United States, that she has never lost that status, that she is entitled to all the privileges and immunities guaranteed to citizens of the United States and to a decree to that effect against all the defendants by virtue of the Federal Declaratory Judgments Act, as amended. Wherefore the plaintiff submits that the decree of the Court of Appeals should be modified so as to reverse the decree of the District Court insofar as it sustains the motion to dismiss as to the defendant Hull; and that as so modified to include all defendants, the decree declaring her to be a natural born citizen of the United States should be affirmed.

Respectfully submitted,

HENRY F. BUTLER,
Attorney for Marie Elizabeth Elg.

Investment Bldg.,
Washington, D. C.

APPENDIX A

FEDERAL DECLARATORY JUDGMENTS ACT.

(AS AMENDED.)

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or through appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the Court, whether a general verdict be returned or not. (48 Stats. 955; amended August 30, 1935, 49 Stats. 1027: 8 U. S. C. 400).

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 454

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, PETITIONERS

v.

MARIE ELIZABETH ELG

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF ON BEHALF OF PETITIONERS

1. The brief of respondent Elg, pp. 23–27, states that the present position of the Government is contrary to a "long established practice." It is further stated that the issuance of the passport to respondent Elg in 1929 was not an error, but was "in accordance with the law as then construed" as evidenced by the letter of the American Consul at Goteborg, dated June 11, 1928 (Ex. B 1–B 2, R. 9–10), and the letter of his successor, dated October 29, 1935 (Ex. B 3–B4, R. 10–12).

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These letters do suggest that respondent's difficulties are due to a change in the interpretation of certain laws and decisions. In accordance with the suggestion made by this Court in *United States* v. *Minnesota*, No. 73, this Term, decided January 3, 1939, inquiry was made of the Department of State in this connection.

A letter from Mr. Green H. Hackworth, Legal Adviser to the Secretary of State, to the Solicitor General, dated February 1, 1939, calls attention to the letter of Mr. Wilbur J. Carr, Assistant Secretary of State, to the Attorney General, dated October 7, 1931, concerning the case of Ingrid Therese Tobiassen. That letter, contained in the files of the Department of Justice, reads, so far as relevant, as follows:

> This Department has for many years uniformly held that former citizens of the United States who have been naturalized during minority in foreign States through the naturalization of their parents must be regarded as having lost their American nationality under the provision of Section 2 of the Act of Congress of March 2, 1907 (34 Stat. 1228). "That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws"; also that the provisions contained in the naturalization treaties between the United States and other countries, including the

naturalization treaty of May 26, 1869, with Norway and the Protocol of the same date, are applicable to the cases of persons naturalized during minority through the naturalization of their parents, as well as to the cases of persons naturalized after attainment of majority upon their own applications. In this connection I enclose, for your information, an excerpt from a memorandum of the Solicitor, dated August 17, 1926, concerning the case of one Baldura Schmidt, a native of this country who was naturalized as a German subject through the naturalization of her father.[1] As indicated therein, this Government has insisted that persons of foreign birth who have been naturalized as citizens of the United States during minority through the naturalization of their parents should not be held for the performance of military service in the foreign countries from which they came upon the ground that, notwithstanding their naturalization in the United States, they retained their original nationality and the obligations attendant thereupon. This Department has contended that their naturalization should be regarded as complete, and that such persons should not be regarded as having a dual allegiance.

[1] We have set out in Appendix A, *infra*, with respect to the case of Miss Baldura Schmidt: (1) Instruction, Mr. Wright, to Mr. Schurman, Ambassador to Germany, September 24, 1925; (2) Mr. Olds, Asst. Sec. of State, to Mr. Parker, October 18, 1926.

Mr. Hackworth's letter continues:

> There are in the files of the Department numerous cases which were decided in accordance with the rule stated in the above quoted passage in the Department's letter of October 7, 1931, to the Attorney General. It would be impossible to find all of these cases, for the reason that most of them were merely indexed under the names of the individuals concerned. However, a number of cases have been found which, it is hoped, will be sufficient for your purposes. Reference is made to the following instructions: February 17, 1917, to the Consul General at Ottawa concerning the citizenship of William H. and George L. Depue; June 4, 1921, to the Consul General at Paris concerning Pedro Alberto de Mora; October, 1925, to the American Consul General at Winnipeg, Canada, concerning Evalou Maris; December 5, 1925, to the American Consul General at Winnipeg, Canada, concerning Ella Aileen Hall.

The instructions referred to are set forth in Appendix A, *infra*.

2. Reference is also respectfully made to Section 317 of a draft Nationality Code, *infra*, Appendix B, dealing with the naturalization of persons situated as is respondent, and providing for the elimination of the requirements of five years residence and previous declaration of intention. This draft Nationality Code was prepared by representatives

of the Departments of State, Justice, and Labor, in pursuance of an Executive Order of April 25, 1933, designating the Secretary of State, the Attorney General, and the Secretary of Labor as a committee to review the nationality laws of the United States, to recommend revisions, and to codify the laws into one comprehensive nationality law for submission to the Congress. It was signed by the three Cabinet members and submitted to the President with a letter from the Secretary of State dated June 9, 1938, and was sent by the President to Congress with a message dated June 13, 1938. This draft Nationality Code indicates the consensus of the executive departments with respect to the present status of the law, and the necessity for legislative action in connection with any amelioration of respondent's situation.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

APPENDIX A

DEPARTMENT OF STATE,
Washington, February 17, 1917.

[No. 1588]

JOHN G. FOSTER, Esquire,
American Consul-General,
Ottawa, Canada.

SIR: The Department has received your despatch No. 2069 of February 9, 1917 (File No. 130), transmitting a letter of the same date which was addressed by you to Messrs. Montgomery, Hart, Smith, and Steere, No. 939 The Rookery, Chicago, Illinois, with which was transmitted a copy of the communication of February 8, 1917, from the Canadian Under Secretary of State concerning the status and citizenship of William H. and George L. Depue, who were born at Edinburg, Indiana, in the years 1892 and 1894, respectively, of a native American father, and were residing with their father in Canada when the latter in September 1911 obtained naturalization as a Canadian citizen for the purpose of enabling him to take up a homestead in Canada. The Under Secretary of State states in his communication that these young men may be considered as having acquired Canadian citizenship through the naturalization of their father under the provisions of Section 26 of the

Canadian Naturalization Act of 1870, which reads as follows:

> If the father, or the mother being a widow, has obtained a certificate of naturalization within Canada, every child of such father or mother who, during infancy, has become resident with such father or mother within Canada, shall, within Canada, be deemed to be a naturalized British subject.

The Under Secretary of State further states that the young men must be recognized by the United States as Canadian citizens under the provisions of the first paragraph of Article I of the Naturalization Treaty between the United States and Great Britain, which reads as follows:

> Citizens of the United States of America who have become, or shall become, and are naturalized according to law within the British dominions as British subjects, shall, subject to the provisions of article II, be held by the United States to be in all respects and for all purposes British subjects, and shall be treated as such by the United States.

Your letter of February 9th, addressed to Montgomery, Hart, Smith, and Steere, together with its enclosure, is this day being sent to that firm. Enclosed herewith for your information is a copy of the Department's letter of this date to the firm mentioned.

Upon a careful consideration of the facts in the cases of William H. and George L. Depue, the Department is of the opinion that they must be held to have acquired Canadian citizenship under the provisions of Section 26 of the Canadian Naturali-

zation Act of 1870, and that their naturalization as such must be recognized by this Government under the provisions of the Naturalization Treaty between the United States and Great Britain.

* * * * *

I am, Sir [etc.],

WILBUR J. CARR,
(For the Secretary of State.)

DEPARTMENT OF STATE,
Washington, June 4, 1921.

ALEXANDRA M. THACKARA, Esquire,
American Consul-General, Paris.

SIR:

* * * * *

The first paragraph of Section 2 of the Act of March 2, 1907, provides in part:

> That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws. * * *

It is admitted that Pedro Alberto de Mora being born abroad of an American father possessed at that time American citizenship under Section 1993 of the Revised Statutes of the United States. However, since his father, Eduardo de Mora, reacquired Cuban citizenship in 1915, and since Pedro Alberto de Mora, through the act of his father, also acquired Cuban nationality in accordance with Cuban law, the Department is of the opinion that the latter expatriated himself under the provisions of the law quoted. Accordingly he

is considered to be not an American citizen and his registration as such citizen cannot be approved.

* * * * *

I am, Sir [etc.],

WILBUR J. CARR
(For the Secretary of State).

DEPARTMENT OF STATE,
Washington, October 1925.

P. STEWART HEINTZLEMAN, ESQUIRE,
American Consul General,
Winnipeg, Manitoba, Canada.

SIR:

* * * * *

Miss Maris states in her application that she was born at Orangeville, Indiana, on February 18, 1902, has resided in Canada since April 1909, and that her father was born at Paoli, Indiana, on December 18, 1862.

In her affidavit on Form No. 213 Miss Maris makes the following statement:

> I came with my parents to reside at St. Elizabeth, Manitoba. Father was naturalized as a Canadian citizen in 1913, and I became of age in 1923, but was not certain that I should register as a citizen in 1923 but, upon learning such, I am now filing application. I have been in training to become a Registered Nurse and, after completing this course, I took the Post Graduate Course at the King George Hospital which terminated January 1925.

Since the father of Miss Maris was naturalized as a Canadian citizen in 1913, it would appear that

under Canadian law the daughter, who was then a minor, became a British subject by reason of such naturalization. Accordingly, her application for registration as an American citizen is disapproved.

I am, Sir, [etc.]

DEPARTMENT OF STATE,
Washington, December 5, 1925.

P. STEWART HEINTZLEMAN, Esquire,
American Consul General,
Winnipeg, Manitoba, Canada.

SIR: The Department has received from your office the application for registration as an American citizen executed on June 29, 1925, by Ella Aileen Hall, who states that she was born at Hartley, Iowa, on July 20, 1901, and that she last left the United States in 1908, going to Canada, where she has since remained. Miss Hall further states that her father, E. E. Hall, was naturalized as a Canadian citizen on June 22, 1912.

In her affidavit on Form No. 213 to explain her protracted residence abroad, Miss Hall states "Came as a minor to reside with my family."

Since it appears that Miss Hall's father was naturalized as a Canadian citizen on June 22, 1912, it would appear that his daughter, who was then a minor, became a British subject by reason thereof, under the Canadian law. Accordingly, her application for registration is disapproved.

I am, Sir, [etc.]

JOSEPH C. GREW
(For the Secretary of State).

DEPARTMENT OF STATE,
Washington, September 24, 1925.

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The Honorable JACOB GOULD SCHURMAN,
American Ambassador, Berlin.

SIR: The Department refers to your despatches Nos. 783 of November 4, 1924, and 823 of November 26, 1924, transmitting certain information concerning Miss Baldura Schmidt and enclosing copies of certain German laws applying to her case.

Miss Schmidt's case has been the subject of considerable correspondence with your office concerning her citizenship status, in connection with her application for registration as an American citizen executed on October 17, 1923.

Since it appears that according to German law, Miss Schmidt acquired German citizenship by virtue of her father's resumption, during her minority, of German citizenship, her application for registration is disapproved.

I am, Sir,

Your obedient servant,

J. BUTLER WRIGHT
(For the Secretary of State).

130-Sch 51141.

DEPARTMENT OF STATE,
Washington, October 18, 1926.

(In reply refer to 130-Schmidt, Baldura.)

Mr. A. WARNER PARKER,
Attorney and Counsellor at Law,
Mills Building, Washington, D. C.

SIR: The Department acknowledges the receipt of your letter of July 5, 1926, with further refer-

ence to the desire of Miss Baldura Schmidt to obtain an American passport. You express the opinion that for the reasons given in your letter and in the copy of the affidavit recently executed by Karl Schmidt, the father of Baldura Schmidt, the Department has erred in its previous decisions declining to issue a passport to Miss Schmidt on the ground that she was expatriated by the act of her father in resuming German nationality.

The Department has again given very careful consideration to the case of Miss Schmidt. In this connection it calls your particular attention to the fact that under the provisions of Paragraph one of the German Law of Nationality of June 1, 1870, a German subject who resided outside of Germany for ten years uninterruptedly without registering with a German official as a German subject lost his German citizenship. The same paragraph of the German Law of Nationality of 1870 also provided that "Loss of citizenship incurred according to this provision extends also to the wife and minor children who are under the paternal authority, provided they are with the husband or father." It appears from the facts in this case that Mr. Schmidt lost German nationality in 1910, under the provisions of the German Law of Nationality of 1870, by reason of his residence outside of Germany for a period of ten years and that such loss of citizenship extended to the wife and minor children who were under his paternal authority.

Paragraph sixteen of the German Law of Nationality of July 22, 1913, provides that "The admission to nationality or naturalization extends, provided that no reserve is made in the certificate, also to the wife and to those children who are legally represented by the admitted or naturalized per-

son in virtue of his paternal authority. Daughters who are or have been married are excepted."

It seems obvious from the facts in this case that Karl Schmidt resumed German nationality in 1923 in accordance with German law, in consequence of which German nationality was also conferred upon his daughter, Baldura Schmidt, then a minor and residing with him. The Department's opinion in this regard is substantiated by a Note from the German Foreign Office to the American Embassy at Berlin, dated October 28, 1924, in which the Foreign Office stated that Karl Schmidt again became a German citizen on February 27, 1923, and that German citizenship was thereby extended to his daughter, Baldura.

In view of the foregoing, the Department is obliged to decline to issue a passport to Miss Schmidt.

Three certificates attesting that a daughter was born to Karl Schmidt and Edith Schmidt on October 22, 1902; an affidavit of October 11, 1920, executed by Edith Kimball Schmidt concerning the birth of her daughter, Baldura, at Shirley, Massachusetts, on October 22, 1902, and an affidavit executed by Baldura Schmidt before the American Vice Consul at Leipzig on May 10, 1924, are enclosed. There is also enclosed a check for the sum of nine dollars, the amount which accompanied the application executed by Miss Schmidt in the Passport Agency of this Department in Boston, Massachusetts, on July 8, 1926. It is requested that you transmit this check to Miss Schmidt.

I am, Sir,

Your obedient servant,

ROBERT E. OLDS, *Assistant Secretary.*

(For the Secretary of State.)

APPENDIX B

REPORT TO CONGRESS CONCERNING THE REVISION AND NATIONALITY LAWS OF THE UNITED STATES

TEXT OF SECTION 317 OF THE DRAFT CODE

SEC. 317.—

(*a*) A former citizen of the United States expatriated through the expatriation of such person's parent or parents and who has not acquired the nationality of another country by any affirmative act other than the expatriation of his parent or parents may be naturalized upon filing a petition for naturalization before reaching the age of 25 years and upon compliance with all rquirements of the naturalization laws with the following exceptions:

1. No declaration of intention and no certificate of arrival and no period of residence within the United States or in a State shall be required;

2. The petition may be filed in any court having naturalization jurisdiction, regardless of the residence of the petitioner;

3. If there is attached to the petition at the time of filing, a certificate from a naturalization examiner stating that the petitioner has appeared before him for examination, the petition may be heard at any time after filing; and

4. Proof that the petitioner was at the time his petition was filed and at the time of the final hearing thereon a person of good moral character, at-

tached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that he intends to reside permanently in the United States, shall be made by any means satisfactory to the naturalization court.

(*b*) No former citizen of the United States, expatriated through the expatriation of such person's parent or parents, shall be obliged to comply with the requirements of the immigration laws, if he has not acquired the nationality of another country by any affirmative act other than the expatriation of his parent or parents, and if he has come or shall come to the United States before reaching the age of 25 years.

(*c*) After his naturalization such person shall have the same citizenship status as if he had not been expatriated.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 454.

FRANCES PERKINS, SECRETARY OF LABOR, AND EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *Petitioners,*

v.

MARIE ELIZABETH ELG.

No. 455.

MARIE ELIZABETH ELG, *Petitioner,*

v.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REPLY BRIEF FOR MARIE ELIZABETH ELG.

Bowing to the suggestions of the Chief Justice, counsel for plaintiff Elg did not press his objection to the Solicitor General's request to file a reply brief for defendants Perkins and Shaughnessy; however, counsel stated to the

Court that his duty to his client required him to remind the Court that the case is before it on motion to dismiss, and the attention of the Court is respectfully directed to the rule laid down this term in *Polk* v. *Glover,* 305 U. S. 5.

By leave of the Chief Justice the plaintiff Elg is filing this reply brief.

It is not necessary to go outside the records in this Court to demonstrate there has been a change in the interpretation and administration of the law by the State Department, and that the Labor Department formerly construed and administered the law exactly as contended for by the plaintiff, until forced to change its practice in June, 1932, by the Tobiassen opinion.

The Labor Department is equally charged with the State Department in the administration of laws relating to American citizenship, and interpretation and practices of the Labor Department are of equal dignity and standing before this Court with those of the State Department.

With Reference to the State Department:

(a) The record in this case indicates, and the defendants by standing on their motion to dismiss fail to deny and tacitly admit, that there has been a change in the interpretation and administration of the law by the State Department between July 22, 1929, when passport 91 (*Ex. D,* R. 12) was issued to plaintiff in accordance with the practice explained in the letter of June 11, 1928 (*Exs. B-1, B-2,* R. 9, 10) of H. C. von Struve, American Consul at Göteborg, a man of great experience and reputation who had been in the Consular Service since 1914 (see *Who's Who in America,* Vol. XVII for years 1932, 1933; died Nov. 5, 1933) and October 29, 1935, the date of the letter (*Exs. B-3, B-4,* R. 10, 11) of Lloyd D. Yates, his successor as American Consul at Göteborg, also a man of experience and the official representative abroad of the Secretary of State, who stated "the interpretation of certain laws

and decisions as regards citizenship have undergone a change."

With Reference to the Labor Department:

(b) Ingrid Therese Tobiassen was admitted in 1929 as a natural born United States citizen, on her birth certificate: and see statements in the Attorney General's opinion on Tobiassen as to the former practices of the Labor Department (36 Op. A. G. 535).

(c) The record on file in this Court in the Reid case shows that Mrs. Barney and Mrs. Carr, appearing as *amici curiae*, were admitted in 1919 during their minority as natural born citizens, although exactly in the class of Mrs. Reid (October Term 1936, No. 352, R. Vol. 2, p. 3).

(d) Albin H. Youngquist was admitted in 1931 during his minority as a natural born citizen, although subsequently held deportable (Senate Report 1613, quoted at p. 50 of the plaintiff's main brief).

Pursuant to request of the Chief Justice for information concerning the past and present practices of the several Departments of Government in the administration of the citizenship laws and for the complete pertinent record in the *Tobiassen* case, counsel for plaintiff Elg requested the Solicitor of Labor Department by letter addressed to the Secretary, dated February 6, 1939 (copy of which is appended hereto as APPENDIX A, *infra* p. 10) and by telephone, to furnish the following data: (1) copy of letter and brief of the Labor Department submitting the Tobiassen matter to the Attorney General, (2) evidence or statement of practice of Labor Department with respect to such cases before and after the Tobiassen opinion, (3) breakdown of the figures given in letter of October 18, 1938, from Solicitor of Labor Department to Attorney General, printed as Appendix B in Government's petition for certiorari, showing approximately how many of the enumerated persons heretofore admitted to this country as citi-

zens, disposition of whose cases is awaiting decision of this case, were admitted as adults on United States passports and how many as minors on birth certificates.

In response thereto counsel was advised that the Labor Department was furnishing the Solicitor General with memorandum of T. B. Shoemaker, Deputy Commissioner, dated February 7, 1939, stating that prior to the Tobiassen opinion the Labor Department and the Immigration Bureau had adhered to the construction contended for by plaintiff, and giving other information sought in counsel's inquiries (set forth as APPENDIX B, *infra* p. 12); together with copies of letter of August 11, 1931, from the Labor Department to the Attorney General and of opinion of Solicitor for the Labor Department re. citizenship of Tobiassen. As the Solicitor General has informed counsel that he will file printed copies of the letter and opinion of August 11, 1931, as Appendix C to a Supplemental Memorandum on Behalf of Petitioners in No. 454, they are not set forth in this brief, but reference hereby is made to them.

Attention of the Court is respectfully directed to the above referred to opinion of the Solicitor for the Labor Department which supports and urges as correct the very contentions herein advanced by this plaintiff, showing that such had been the interpretation and administration of the laws by that Department. (Supplemental Memorandum on Behalf of Petitioners, No. 454, pp. 23-32.)

Counsel for plaintiff had assumed that after entry of the decree in the District Court no new evidence would be admissible in this case and consequently from that time up to and including the time of argument before this Court he has made no effort to obtain and collate further evidence of the former practices of the several Governmental Departments. As he does not have access to the official files of the Government, it is an almost impossible task in the few days permitted for the drafting, printing and filing of this reply brief to obtain such evidence.

The facts and documents above referred to clearly indicate that the former practice of the Labor Department was contrary to its present practice, which has been forced upon it by the Opinion of the Attorney General in the *Tobiassen* case, and the decision of the *Reid* case in the Ninth Circuit. They also tend to explain why the Reply Brief of Defendants Perkins and Shaughnessy in No. 454, filed by the Solicitor General in the course of argument, failed to offer any evidence of the practice of the Labor Department, but contained only some letters of the Secretary of State pertaining to several specific cases, some of which are not in point.

In an effort to obtain advice and information which would indicate that the State Department has not consistently followed its alleged practices, counsel inquired of that Department concerning certain practices generally, and certain cases specifically. The response of that Department, dated February 8, 1939, signed by R. B. Shipley, Chief, Passport Division is set forth as APPENDIX C, *infra* p. 14, and the original letter filed with the Clerk of this Court. Counsel does not concede that the alleged practices have been consistently followed, nor that they were the customary practices at the date of issuance of passport to plaintiff Elg. However, counsel submits that they do indicate an acknowledged admininstrative practice at the present time which purports to rest the retention or loss of United States citizenship upon the State Department's interpretation of the foreign law in force for the time being in any of more than 60 different countries which have legislation on citizenship, which law may be changed over night and subsequent to the date of departure from the United States of the person whose birthright is at stake.[1] The letter confirms counsel's statements in argument that under the Government's theory every American lives in jeopardy of being expatriated involuntarily by operation of a foreign law, that contrary to the decided cases expatriation of children

[1] See State Department letter, *infra*, p. 14, at 16.

can be effected by mere residence abroad, in conjunction with a foreign statute, and that American born children whose parents were *American citizens* are more susceptible to loss of their birth citizenship than those born of *alien parents*,—indeed an anomalous situation.

This letter also tends to answer the inquiries of Mr. Justice Stone concerning treaty provisions under which the plaintiff Elg might have lost her American citizenship. Although the letter describes administrative practices with respect to several foreign countries with which the United States has treaties, it makes *absolutely no reference to those treaties*, but rests the retention or loss of United States citizenship solely on the question of whether or not the person involved *acquired a foreign citizenship under the foreign law*. The only treaty mentioned is the Treaty of Trianon, and the Department acknowledges it erred in construing the effects of that treaty on Hungarian and Rumanian local law with the result that it ruled prejudicially to the citizenship rights of some of our natural born citizens who chanced to have been in those countries, until the Rumanian Foreign Office set it right. This confirms counsel's contentions in argument that the treaty with Norway and Sweden has nothing whatever to do with the question in issue in this case. (See Plaintiff Elg's main brief, pp. 29-35.)

Examination of contemporaneous construction of the Act of March 2, 1907, discloses the absence of any ruling or remarks pertaining to loss of citizenship by minors in a State Department Circular on EXPATRIATION issued April 19, 1907, citing the act involved in this case, and concluding, "So much of this instruction as relates to residence abroad is not applicable to natural-born citizens of the United States. Their status, so far as their right to the protection of this Government is concerned, is governed by existing instructions of this Department, and especially by so much of the circular instruction of March 27, 1899, as applies to them, which is appended to this instruction for your information." Under the same date instructions were is-

sued pertaining to CHILDREN OF CITIZENS BORN ABROAD, with reference to retention of their citizenship by registering at age 18 and taking the oath of allegiance at age 21. Neither in these nor in any other instruction or circular issued at that time nor up until the passport was issued to plaintiff Elg is there any reference to loss of citizenship by minors. The circular of March 27, 1899, discusses expatriation, but is silent as to minors and clearly contemplates voluntary, intentional acts on the part of adults, *sui juris*, and not under compulsion. (See Compilation of Certain Departmental Circulars Relating to Citizenship, etc., Department of State, 1925, pp. 1, 10, 11; Foreign Relations of the United States, 1907, Part 1, pp. 3-6, 9, 10.) The letter of the Chief Justice, then Secretary of State, of November 24, 1923, which counsel referred to in argument, indicates that the State Department did not then recognize the expatriation of minors for any reason. (See Compilation of Certain Departmental Circulars Relating to Citizenship, etc., p. 118; for convenience of the Court, copies of this letter have been left with the clerk, and a copy given to the Solicitor General.) Although Moore's Digest was published in 1906 (and therefore does not contain any references to decisions under the Act of March 2, 1907), Vol. III is replete with cases where the State Department has vehemently protested loss of United States citizenship by minor children, in many of which Bancroft treaties were involved. Contemporaneous constructions of the treaty and of the act, continued for many years, particularly where they consort with the equities in the case, give weight to the plaintiff's contentions. (*United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621, and cases there cited.)

The record at page 20 indicates that there are three other Elg children, younger than the plaintiff, one born in New York in 1909, and two born in Sweden in 1912 and 1915 respectively, prior to their father's return for permanent residence in 1922. All these children had American citizenship at birth, one under the Constitution, and the

younger two under Revised Statutes, Sec. 1993, which then provided:

> "Section 1993, Revised Statutes: All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The Act of March 2, 1907, Section 6, when the foreign born Elg children attained 18 years of age provided:

> "Act of March 2, 1907, section 6: . . . all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become resident and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

It does not appear how the Departments construe the law concerning loss of citizenship of children born abroad of American parents, under facts pertaining in this case. If the two younger children retain a right of election until age 18, or 21, under Sec. 6 of the Act of March 2, 1907, then they would be in a better position than their elder sisters born in the United States; if they lose their American citizenship upon repatriation of their father, then Sec. 6 of the Act is nullified by operation of foreign law. Citizenship of the other Elg children may not be pertinent to the decision of this case, but it affords an example of the inconsistencies that may arise under the Government's contentions.

As further evidence of a change of practice by both Departments, reference is made to a publication of the For-

eign Language Information Service, an incorporated organization whose purpose is to aid the immigrant and the foreigner in this country and which works in close cooperation with the Departments of State and of Labor in all such matters. On December 14, 1932, it issued one of its customary bulletins entitled INTERPRETER RELEASE (Vol. IX, No. 43, pp. 319-324) "Concerning the Expatriation of American-Born Minors" and setting forth the changed interpretation and application of the law resulting from the Tobiassen Opinion. The first paragraph of the release states:

> "For many years it has been the general belief that birth in the United States conferred a type of citizenship that could not be lost except through some affirmative act of the native American himself. According to a recent ruling by the Attorney General for the United States, however, such is not always the case; he holds that minors, born in the United States, may under certain circumstances be deprived of their citizenship through the acts of others over which they have no control."

On page 323 the release describes two cases where the State Department had, consistent with the rule declared in the *Tobiassen* case, declined to issue passports to persons deemed to have lost birth citizenship during minority. It is submitted that had this practice been customary with the State Department prior to the Tobiassen ruling the Foreign Language Information Service, an organization of long standing, enjoying most friendly and close relationship with the Departments involved, would have known of such practice, would not have referred to it as a change in the interpretation of the law and would not have cited as novel and unusual such cases concerning loss of citizenship. This publication is available at the Library of Congress, call No. JK 1751.F6 but for convenience of the Court counsel is obtaining copies which will be left with the clerk.

Respectfully submitted,

HENRY F. BUTLER,
Counsel for Marie Elizabeth Elg.

(Copy)

APPENDIX A.

Telephone District 2409
Cable Address "RELTUB"

Law Offices
CHARLES HENRY BUTLER
HENRY F. BUTLER
W. CAMPBELL ARMSTRONG

Investment Building
Washington, D. C.

February 6, 1939

The Secretary of Labor
Washington, D. C.

Dear Madam Secretary:

Last Friday in the course of the argument before the Supreme Court of the United States in the consolidated cases of *Perkins et als* v. *Elg* and *Elg* v. *Perkins et als*, the Chief Justice stated he desired all evidence of previous practice of the several departments in connection with the recognition or loss of American birth citizenship in minor children to be before the Court and to that end authorized me to file a reply brief, submitting such data.

Will you be good enough to furnish me with the brief of the Labor Department and other pertinent material in connection with submission to the Attorney General of the Ingrid Therese Tobiassen matter which became the subject of his opinion as reported in 36 Ops. A. G. 535.

Will you also be good enough to advise me what was the customary procedure of the Labor Department and the Immigration Service in admitting to the United States during their minority persons who had acquired United States citizenship by birth in this country, but who had been taken abroad by their parents, who had thereupon become naturalized or repatriated in a foreign country.

Will you also be good enough to advise me whether prior to the Tobiassen opinion in 1932 it was the practice of the Labor Department and Immigration Service to deport as aliens persons admitted to the United States (in the position of Miss Elg and Miss Tobiassen) either on birth cer-

tificate during minority or on passport or otherwise, but whom it was subsequently discovered had resided during minority with parents abroad and whose parents had or may have acquired a foreign nationality as a result of which the persons in question may have had conferred upon them during minority such nationality.

You will appreciate that as I have no access to the official files of your Department, it is impossible for me to refer to specific cases and I must therefore inquire generally in the hope that you will give me the information I desire.

Very respectfully,

HENRY F. BUTLER

HFB:FH

Certain further inquiries indicated on page 3 of the foregoing brief were made orally and are answered in the Memorandum of the Deputy Commissioner, *Appendix B*.

APPENDIX B.

U. S. DEPARTMENT OF LABOR
IMMIGRATION AND NATURALIZTION SERVICE
WASHINGTON

Address Reply to Commissioner of Immigration and Naturalization and Refer to File Number 23/22894

February 7, 1939.

Memorandum:

Prior to June 16, 1932, when the Attorney General rendered his opinion in the case of "Citizenship of Ingrid Therese Tobiassen" (36 Op. Atty. Gen. 535), it was the view of the then Bureau of Naturalization, and it so advised members of the public when such cases arose, that retention of citizenship was a personal matter and expatriation could not be accomplished through the act of the father. This view was based upon a dictum contained in the opinion of the Supreme Court in United States v. Wong Kim Ark (169 U. S. 649, 704). The particular language involved is as follows:

> "Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce this citizenship, and become a citizen of the country of his parents, or of any other country; for by our law, as solemnly declared by Congress, 'the right of expatriation is a natural and inherent right of all people,' . . . Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful."

Upon the rendition of the Attorney General's opinion in the Tobiassen case, the administrative view upon the subject was modified to conform to the Attorney General's opinion.

Careful effort has been made to locate and identify circular notifying the Field of change of practice with regard to the admissibility of children on birth certificates, but it

appears that the copy of the Attorney General's opinion was sent without any accompanying comment.

With respect to the figures showing the number of cases, they are only an approximation, and it is not possible to even approximate the number who have been readmitted on passports or birth certificates.

Attached hereto are copies of letter of Aug. 11, 1931, from this Department to the Attorney General and Solicitor's memorandum of same date, re citizenship of Ingrid Therese Tobiassen.

(Sgd.) T. B. SHOEMAKER,
Deputy Commissioner.

Enclosures.

The enclosures above referred to, being the letter of Aug. 11, 1931, and Solicitor's Memorandum of same date, are not printed in this brief, but are set forth in Supplemental Memorandum on Behalf of Petitioners in No. 454 as Appendix C, pp. 21-32, to which reference is hereby made.

APPENDIX C.

Address official communications to
The Secretary of State
Washington, D. C.

DEPARTMENT OF STATE
WASHINGTON

In reply refer to
130-Skonnord, Eigil Norman

February 8, 1939.

Mr. Henry F. Butler,
Investment Building,
Washington, D. C.

My dear Mr. Butler:

The Department has received your letter of February 7, 1939, in which you refer to the cases of Irma Ocskay and Helmer Larsson or Lawson. Your letters of February 6, 1939, have also been received in which you refer to the case of Mr. Eigil Norman Skonnord. You request information concerning the cases mentioned in connection with your desire to obtain information relative to the citizenship status of a minor child whose father is naturalized as a citizen of a foreign country or who reacquires the nationality of a foreign country of which he has formerly been a citizen or subject.

The Department's records are confidential and it is contrary to its established practice to furnish information therefrom except upon the request of the person concerned, his duly authorized agent, a near relative, or a court in which a cause of action is pending in connection with which the information is desired.

However, in view of the purpose for which you desire the information it may be stated that neither the case of Helmer Larsson nor the case of Eigil Norman Skonnord involved any citizenship question similar to that concerning which you desire information.

Cases have arisen where children were born in the United States of British parents and accordingly possess British citizenship under British law and American citizenship under the laws of the United States. Subsequently, the fathers of such children were naturalized as American citi-

zens but since the children already possessed American citizenship, there was no change in the nationality of the child in so far as the laws of the United States were concerned nor under the laws of Great Britain since the child had not been naturalized as an American citizen. In such cases where the fathers proceeded to Canada and were naturalized as Canadian citizens, the children were not naturalized in Canada as a result of the fathers' naturalization since they were regarded as already possessing British nationality. Therefore, the Department held in such cases that the child had not been naturalized as a citizen of a foreign country and accordingly had not lost American citizenship.

A similar situation arises with regard to Italian nationals but with a different result from a legal standpoint. A child who is born in the United States of an Italian father is born with dual nationality but under Italian law if the father is naturalized as an American citizen the child loses Italian citizenship notwithstanding the fact that under the laws of the United States the child is not naturalized as an American citizen due to the fact that the child already possessed American citizenship by reason of his birth. Under this state of facts, if the Italian father takes the minor child and returns to Italy and is naturalized as an Italian citizen under the laws of Italy, his child, if residing with him, is also regarded as becoming a naturalized Italian citizen since prior to the father's reacquisition of Italian nationality the child did not possess such nationality; in such a case the child is regarded by the Department as having been naturalized in a foreign country pursuant to its laws and considered to have lost American citizenship through the operation of the first paragraph of Section 2 of the Act of March 2, 1907.

Cases of persons of Swedish or Norwegian origin have also arisen and the question of whether a child who possessed American citizenship by birth in the United States would be regarded as having lost American citizenship through the acquisition or reacquisition of Norwegian or Swedish nationality on the part of the child's father would depend upon whether the child possessed Norwegian or Swedish nationality at the time of the acquisition or reacquisition of such citizenship on the part of the father; or in other words, whether the child was actually naturalized as a Swedish or Norwegian citizen at the time of the reacquisition or

acquisition on the part of the father. The laws of Sweden and Norway operate in the same manner as the laws of the United States in that a child who possesses Swedish or Norwegian nationality loses such nationality if by virtue of the father's naturalization in the United States the child becomes a citizen of the United States. However, the laws of both countries have contained from time to time various other provisions under which a child born with Swedish or Norwegian nationality might lose such nationality through the act of the father. For example, such a child under Swedish laws in effect up until 1925, even though born in the United States, would lose Swedish citizenship by reason of the father's loss of such citizenship through residence outside of Sweden for a period of ten years or under the laws of Norway if the father established a permanent residence in a foreign country.

With reference to the case referred to in your letter which involved the application of the Rumanian Law of 1924, it may be stated that a certain case has come to the attention of the Department in which a child was born in the United States prior to the World War of a Hungarian father who was a native of that part of Hungary which became Rumanian territory as a result of the World War. Such a child possessed at birth dual nationality. After the War the father and the child proceeded to Rumania and established their residence there. In 1924 the Rumanians enacted a law which provided for the making of a list of all persons born in Hungarian territory which had been ceded to Rumania who were to be recognized as Rumanians. Under the Rumanian law the minor children of such persons were also to be recognized as Rumanians. This Department when first investigating these cases was advised that the Rumanian Act of 1924 was a naturalization statute and that persons who were accorded Rumanian nationality thereunder were naturalized as Rumanians. Accordingly, it held that in such cases the American born child whose father had had his name placed upon the Rumanian nationality list was naturalized as Rumanian and lost his American citizenship. Subsequently, as a result of a further investigation of the foregoing matter and of correspondence conducted between this Government and the Government of Rumania, an official communication was received from the Rumanian Foreign Office in which this

Department was informed that the inscription in the nationality list under the terms of the Act of 1924 was not a formality imposed by law for the acquisition of the right to Rumanian citizenship, but only an establishment of an existing right which the persons concerned acquired *ipso facto* through the operation of the Treaty of Trianon. As a result of this information, the Department reached the conclusion that the American born child of a Rumanian father whose name had been placed upon the Rumanian nationality list under the terms of the Rumanian Act of 1924 above referred to could not be regarded as having been naturalized as a Rumanian citizen since the according of Rumanian citizenship to such a child was a mere substitution of Rumanian for Hungarian nationality and in such cases the child was not considered by the Department to have lost American citizenship.

Sincerely yours,

R. B. SHIPLEY,
Chief, Passport Division.

FILE COPY

Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 455

MARIE ELIZABETH ELG,
PETITIONER,
vs.
FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

HENRY F. BUTLER,
Attorney for Petitioner,
Investment Building,
Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. HARPER, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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Supreme Court of the United States

OCTOBER TERM, 1938.

No.....

MARIE ELIZABETH ELG,
Petitioner,

vs.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Charles Evans Hughes, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

Petitioner, Marie Elizabeth Elg, a natural-born citizen of the United States, prays that a writ of certiorari issue to review the decree of the Court of

Appeals for the District of Columbia entered in the above entitled case on August 1, 1938 (R. 39).

Petitioner excepts to and seeks review of the decree only insofar as it affirms the decree of the District Court sustaining the motion to dismiss as to the defendant Cordell Hull and dismissing the bill of complaint as to the defendant Hull and thereby denying to the petitioner a declaratory decree as to defendant Hull that she is a natural-born citizen of the United States (R. 26).

Opinions Below.

The District Court opinion written by District Judge Jennings Bailey was filed November 1, 1937 (R. 25) and is not published in any of the official reports. The opinion of the Court of Appeals written by Chief Justice Groner was filed August 1, 1938 (R. 32-38) and is reported in ~~F. (2)~~ F. (2) ___.

Jurisdiction.

The decree of the District Court sustaining motion to dismiss the bill of complaint as to the defendant Hull and dismissing the bill of complaint as to defendant Hull, and overruling motion to dismiss the bill of complaint as to defendants Perkins and Shaughnessy and declaring the petitioner to be a natural-born citizen of the United States was filed November 18, 1937 (R. 26). The decree of the Court of Appeals affirming the decree of the District Court was filed August 1, 1938 (R. 39). Petitioner's mo-

tion for leave to file motion to amend decree was denied by the Court of Appeals October 19, 1938 (R. ~~42~~ 41.) The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

The amount involved is impossible to state in figures, but is the great value to a natural-born citizen of the United States of the citizenship conferred by the Constitution, which this Court has said is of tangible worth and invokes the sympathy of this Court in the citizen's efforts to retain it. *MacKenzie vs. Hare*, 239 U. S. 299, 312.

Principal Questions.

In her bill of complaint as filed, the petitioner sought both a declaratory decree under the Federal Declaratory Judgments Act, as amended (28 U. S. C. A. 400, 49 Stat. 1027) to determine questions of jurisdiction and also injunctive relief. As either of these remedies is sufficient without the other, the Court having held that she should have a declaratory decree as against two of the defendants, she does not press her prayer for injunctive relief except as an alternative remedy if the declaratory decree should be ultimately denied. Therefore the principal questions now relate to the extent of the declaratory decree.

The underlying question in this case is whether a person who was born in the United States, and therefore who was at birth a natural-born citizen of the United States by virtue of Section 1 of the XIV

Amendment to the Constitution,* can be divested of such birth citizenship during her minority by the act of another or by operation of a foreign law.

As to defendants Perkins and Shaughnessy the Court below has answered this question in the negative and has declared the petitioner to be a natural-born citizen of the United States, but as to the defendant Hull has dismissed the bill for reasons given in the opinions (R. 25, 32-38), wherefore it may be contended that as to the Secretary of State the decree is not binding and this question is still undetermined.

The principal question sought to be raised by this petition, most concisely stated, is whether the erroneous administrative determination of the Secretary of State that he has no jurisdiction to issue an American passport to the petitioner because of his erroneous determination that petitioner is not a United States citizen, is immune from judicial review on the ground that if he had determined that the petitioner was a United States citizen, the issuance of a passport would still rest in his sound discretion, with which the Court will not interfere.

More specifically stated, the question is whether where the Secretary of State has erroneously determined that the petitioner, a natural-born citizen of the United States, has been divested of her citizenship and therefore that the Secretary of State has no

*Section 1 of the XIV Amendment to the Constitution provides:
"All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside".

jurisdiction to issue an American passport to her, the petitioner is entitled to a judicial determination and declaration of her citizenship which shall be binding upon the Secretary of State and establish his jurisdiction in the matter; or whether because the Secretary of State has discretionary powers over the issuance of passports to American citizens, the petitioner shall be denied as to him a determination and declaration of the jurisdictional fact of her American citizenship.

Statement of Facts.

Briefly stated, the record shows the following facts; Petitioner, a natural-born citizen of the United States (R. 1; R. 8; *Ex. A;* R. 15, *Ex. H-1),* was born in Brooklyn, New York, October 2, 1907, of parents who had emigrated from Sweden and had become naturalized citizens of the United States prior to her birth, to wit, on September 24, 1906 (R. 8, *Ex. A; Exs. C & G* fol. R. 10 & 14; R. 15; *Ex. H-1;* R. 19, *Ex. H-3).*

In 1911, when petitioner was about four years of age, she was taken by her mother to Sweden, where she resided until she became twenty-one years of age (R. 2; *Exs. C & G,* fol. R. 10 & 14; R. 15, *Ex. H-1*).

On July 25, 1922 (defendants allege) petitioner's father went to Sweden and has not since returned to the United States (R. 15; *Ex. H-1;* R. 19, *Ex. H-3*). However, he retained his United States certificate of naturalization until at least November 13, 1934 when (defendants allege) he voluntarily surrendered it (R. 15-19, *Exs. H-1, H-2, H-3).* He committed no other act

of expatriation or of acquisition of a foreign citizenship and no action was ever brought against him to cancel his United States naturalization certificate.

In 1928, before petitioner attained majority, she made inquiries with a view to returning to the United States.

In 1929, within one year after attaining majority, upon her application setting forth all the foregoing facts then existent, the Secretary of State instructed the American Consul at Göteborg, Sweden to issue an American passport to petitioner, and in the same year she was admitted at the Port of New York as a natural-born United States citizen and has since continued to reside in the United States (R. 2; R. 9, 10 *Exs. B-1 & B-2; Ex. C* fol. R. 10; R. 3; R. 11, 12, *Exs. D & E*).

Petitioner has never committed any voluntary act of expatriation; she has never voluntarily become naturalized in any foreign country, nor taken nor subscribed to any oath of allegiance to any foreign country (R. 1); on the other hand, she has on several occasions taken and subscribed to the oath of allegiance to the United States (R. 2; *Exs. C & G*, fol. R. 10 & 14).

However, in April, 1934, petitioner was subjected to proceedings instituted by the Immigration Service in New York City, was told she was an alien, was induced to execute a sworn affidavit stating the foregoing facts which were made the basis of *ex parte* departmental inquiry and review at home and abroad (R. 3; R. 13, *Ex. F-1;* R. 15-19, *Exs. H-1, H-2 & H-3*). In April, 1935,

she was formally notified that she was an alien, illegally in the United States, ordered to leave this country, and threatened with deportation if she did not depart forthwith (R. 3; R. 13, *Ex. F-1*). Defendants Perkins and Shaughnessy from time to time postponed taking further steps toward her deportation, but have not countermanded their order and threats, which have only been stayed pending final determination of this case (R. 14, *Exs. F-2, F-3;* R. 21, 22).

In July, 1936, petitioner applied to the Secretary of State for an American passport upon an application (R. 4; *Ex. G,* fol. R. 14) in substance identical with her application of 1929 on which a passport had been issued to her. The defendant Hull refused to issue a passport to petitioner solely on the *jurisdictional* ground that he had administratively determined she was not a citizen of the United States and therefore he had no power or authority to issue a passport to her; he did not purport to pass upon the merits of her case nor did he deny her a passport in the exercise of his discretionary powers over the issuance of passports to American Citizens (R. 4, 5; R. 15, 16, *Ex. H-1;* R. 18, 19, *Exs. H-2 & H-3*).

Further efforts before both the Departments of Labor and of State to establish the fact that the petitioner was a United States citizen and therefore that the Secretary of Labor had no jurisdiction over her continued stay in the United States and that the Secretary of State did have jurisdiction to consider her application and authority in his discetion to issue to her an American passport, were of no avail (R. 14, *Exs. F-2 & F-3;* R. 18, 20, *Exs. H-2 & H-4*).

History of the Case.

Upon the foregoing state of facts, on January 14, 1937, the petitioner brought her suit in the United States District Court for the District of Columbia against Frances Perkins, Secretary of Labor, Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, and Cordell Hull, Secretary of State, praying the Court (1) to issue a declaratory judgment that she is a citizen of the United States; (2) to enjoin defendants Perkins and Shaughnessy from further prosecuting deportation proceedings against her; (3) to enjoin the defendant Hull from impugning or denying her American citizenship and from refusing to issue her a passport solely on the ground that she is not such a citizen; (4) to enjoin defendants Perkins and Shaughnessy *pendente lite* from taking further action toward her deportation until final determination of this suit, and (5) other and proper relief (R. 1-6).

On January 26, 1937, rule to show cause why temporary injunction should not be issued was discharged without prejudice to the rights of the parties upon statement by defendants Perkins and Shaughnessy by their attorneys that no proceedings to enforce deportation of petitioner would be taken pending final outcome of this case (R. 20, 21).

On February 4, 1937, defendants Perkins, Shaughnessy and Hull filed a motion to dismiss the bill of complaint on the grounds that the plaintiff is not a citizen of the United States by virtue of the Laws of Sweden in conjunction with a protocol to a convention between the United States and Sweden and Norway

(34 Stat 1228)

and Section 2 of the Act of March 2, 1907* and for alleged defects in the pleadings (R. 23, 24).

The motion to dismiss was argued in the District Court before Mr. Justice Bailey who, on November 1, 1937, rendered the opinion of the Court that as to the defendant Hull the motion to dismiss should be sustained "for the reason that the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue"; that in other respects motion to dismiss should be overruled (but no injunctive relief was granted) (R. 25, 26).

In accordance with the opinion, on November 18, 1937, final decree was entered in the District Court sustaining the motion to dismiss as to defendant Hull and dismissing the bill of complaint as to defendant Hull, and overruling the motion to dismiss as to defendants Perkins and Shaughnessy and declaring the plaintiff to be a natural-born citizen of the United States (R. 26).

From the foregoing final decree both the petitioner and the defendants Perkins and Shaughnessy appealed on November 18, 1937 (R. 26, 27).

The appeal was argued, and on August 1, 1938, the Court of Appeals rendered its decision through the opinion of the Chief Justice, and in accordance there-

*Section 2 of the Citizenship Act of March 2, 1907 provides:
"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."

with decree was entered on the same day affirming the decree of the District Court in all respects (R. 32-38, 39).

On October 15, 1938 petitioner filed motion for leave to file motion to amend decree so as to reverse decree of the District Court insofar as it dismissed the bill of complaint as to defendant Hull; this motion was denied on October 19, 1938 on the ground that the object sought by proposed motion is fully taken care of in original opinion (R. ~~42, 43~~. 41.)

The mandate has been stayed in the Court of Appeals and the defendants Perkins and Shaughnessy have stated they intended to file petitions for writ of certiorari. In order that all issues may be presented for review, the petitioner is filing this petition for writ of certiorari.

Errors To Be Urged.

The Court of Appeals erred in holding that as to the defendant Hull, Secretary of State, the motion to dismiss the petitioner's bill of complaint should be sustained and the bill of complaint dismissed as to the defendant Hull on the ground that the issuance of a passport involved discretion.

The Court of Appeals erred in affirming the decree of the District Court dismissing the petitioner's bill of complaint as to the defendant Hull on the ground that "the Court will not undertake by mandamus to compel the issuance of a passport, nor to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue".

Apparently both the District Court and the Court of Appeals misconstrued the petitioner's bill of complaint as seeking to compel the Secretary of State to issue a passport to her. The petitioner recognizes that the issuance of a passport to an American citizen rests in the sound discretion of the Secretary of State and she does not seek by injunction, mandamus, declaratory judgment or other coercive measures to interfere with his discretionary powers in that respect. As set forth above in the Statement of Facts, the Secretary of State has not denied a passport to petitioner in the exercise of his discretion but solely on the grounds that as he has administratively determined she is not an American citizen he cannot issue her a passport as he lacks the jurisdiction to do so. The petitioner's prayer for a declaratory decree is for determination of her American citizenship, and establishment of the fact that the Secretary of State has jurisdiction to issue her a passport, although whether or not he will do so will then remain in his sound discretion. Her prayer for injunction (not pressed if a declaratory decree issues) is that the Secretary of State be enjoined from impugning her American citizenship and refusing to issue her a passport *solely on the ground that she is not such a citizen*. Both courts therefore erred in holding the bill should be dismissed as to the defendant Hull on the grounds stated.

Reasons for Granting the Writ.

The defendants Perkins and Shaughnessy have stated they intend to petition for writ of certiorari for review of the decree insofar as it affects them and if

their petition is granted the petitioner herein would be greatly prejudiced if this petition were not also granted and the entire case brought before this Honorable Court for review.

The case is of importance to the general public as it involves the inviolability of United States citizenship conferred at birth by the Constitution on all persons born, as was the petitioner, within the territory and under the jurisdiction of the United States and thus affects all citizens, of which there are many, in the class of the petitioner.

The questions raised by this petition are of importance to the general public as there are numerous persons in the class of the petitioner who are not threatened with deportation but are denied diplomatic protection, including protection of their property, if any, in foreign countries, and whose only recourse for a determination and declaration of American citizenship would lie in a bill for a declaratory judgment brought against the Secretary of State.

The decree below should be reviewed and clarified because, as entered, it is inconsistent in that it properly sustains the bill as to the defendants Perkins and Shaughnessy and as to them declares petitioner to be a natural-born citizen of the United States, but erroneously dismisses the bill as to the defendant Hull and as to him leaves her citizenship undetermined, unadjudicated and in doubt.

Dismissal of the bill of complaint as to the defendant Hull, permitting him to stand on his erroneous de-

termination that petitioner is not an American citizen and to continue to deny her protection to which every American citizen is entitled and to invade and interfere with her rights and immunities as an American citizen constitutes a denial of the due process of law guaranteed by the V Amendment to the Constitution.*

WHEREFORE petitioner respectfully prays that a writ of certiorari be issued directed to the United States Court of Appeals for the District of Columbia directing that the record and proceedings in the above entitled case be certified to this Honorable Court for review; and that the decree of the Court of Appeals be amended so that the decree of the District Court shall be reversed insofar as it dismisses the bill of complaint as to the defendant Hull and as so modified to include the defendant Hull the decree declaring the Petitioner to be a natural-born citizen of the United States shall be affirmed.

MARIE ELIZABETH ELG.
By: HENRY E. BUTLER,
Her Attorney,
Investment Building,
Washington, D. C.

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*The due process clause of the V Amendment to the Constitution provides:
"No person shall be * * * deprived of life, liberty, or property, without due process of law;"

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 455

MARIE ELIZABETH ELG, PETITIONER

v.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR CORDELL HULL, SECRETARY OF STATE

The petition herein seeks review of the decision of the Court of Appeals for the District of Columbia in so far as that court held that the Secretary of State was not a proper party to the proceeding.

On July 16, 1936, the petitioner filed an application for a passport as a United States citizen, which was transmitted to the Department of State. On July 29, 1936, petitioner was informed by the Chief of the Passport Division of the Department of State that her application was denied on the ground

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that she was not an American citizen (R. 4). The petitioner recognizes (Pet. 11) that the granting of a passport is discretionary, and that a court cannot be asked to compel the issuance of a passport. The petitioner insists, however, that she is entitled to a declaratory judgment directed against the Secretary of State which will establish her status as an American citizen and which will therefore have the effect of requiring the Secretary of State or those acting for him to exercise their discretion as in the case of an application by any American citizen.

It will be observed that the application for a passport and the denial thereof occurred more than two years ago. In order that the information required of an applicant shall have reference to the present, it is within the power of the Secretary of State to require that a new application be presented in the event that the petitioner now wishes to leave the country.[1] The decision of this Court in No. 454, if the Court grants the Government's petition for certiorari therein, will, of course, determine the status of petitioner and will

[1] The passport regulations issued by the Department of State provide (pars. 32, 34, 35) that each application of a native citizen for a passport must contain, *inter alia*, the name of the port from which, and the name and date of sailing of the vessel upon which, the applicant intends to depart from the United States; the names of the countries the applicant intends to visit and the object of the visit to each; and the period within which the applicant intends to return to the United States.

be regarded by the Secretary of State as controlling in relation to his jurisdiction to issue a passport to the petitioner. Consequently, there appears to be no occasion for the granting of the petition herein in order to review the correctness of the action of the courts below in ordering the bill dismissed as against the Secretary of State.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

GREEN H. HACKWORTH,
Legal Adviser, Department of State.

NOVEMBER 1938.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 455

MARIE ELIZABETH ELG, PETITIONER

v.

FRANCES PERKINS, SECRETARY OF LABOR, EDWARD J. SHAUGHNESSY, ACTING COMMISSIONER OF IMMIGRATION AND NATURALIZATION, AND CORDELL HULL, SECRETARY OF STATE

ON WRIT OF CERTIORARI

MEMORANDUM FOR THE RESPONDENT, CORDELL HULL, SECRETARY OF STATE

The petition herein seeks review of the decision of the Court of Appeals for the District of Columbia in so far as that court held that the Secretary of State was not a proper party to the proceeding.

The bill of complaint filed by Marie Elizabeth Elg alleges (R. 4–5) that on July 16, 1936, plaintiff filed an application for a passport, and that on July 29, 1936, she was informed by the Chief of the Passport Division of the Department of State that such passport was denied, solely on the ground that she had lost her United States citizenship (see R.

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15–18). The bill of complaint prayed for a declaratory judgment of the United States citizenship of Marie Elizabeth Elg, and also for an injunction restraining defendant, Cordell Hull, individually and as Secretary of State, from making any statements to the effect that plaintiff is not a citizen and from refusing to issue her a passport solely on the ground that she is not such a citizen (R. 6).

On motion to dismiss, the District Court sustained the motion as to defendant Hull, for the reason that the Court would not undertake "to control by means of a declaratory judgment the action of one whose function it is to consider and decide whether or not a passport should issue (R. 27). On the cross-appeal of Marie Elizabeth Elg, the United States Court of Appeals for the District of Columbia affirmed this judgment (R. 41).

No objection is now being made by the Government to the use of an action for a declaratory judgment in order to test the status of citizenship. Thus, the petition for certiorari in No. 454, *Perkins et al.* v. *Elg*, did not call into question the propriety of this relief provided that Marie Elizabeth Elg was held to be a citizen.

As stated in the memorandum for Cordell Hull upon the petition for certiorari in No. 455, the decision of the Court in No. 454 will determine the status of petitioner and be regarded as controlling by the Secretary of State (pp. 2–37). Therefore the granting of declaratory relief against defendant Hull *vel non* is not a matter of consequence in

this case. However, lest an undesirable precedent be created by default, it is desired to state the Government's view that in the circumstances of the present case, the relief requested against defendant Hull would not be proper.

1. In the first place, the issuance of a declaratory judgment against defendant Hull would extend the jurisdiction previously considered proper by the federal courts. It is plain that the Federal Declaratory Judgment Act[1] was not intended to and does not add to the jurisdiction of the federal courts, but merely provides an additional remedy in cases where they already have jurisdiction. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; *United States* v. *West Virginia*, 295 U. S. 463, 475; *Aetna Casualty and Surety Co.* v. *Quarles*, 92 F. (2d) 321, 324. Granting declaratory relief as to defendant Hull would expand jurisdiction by permitting a suit to be brought against the United States, and by permitting the court to substitute its discretion for that of the executive departments in a matter belonging to the proper jurisdiction of the latter.

A suit against the Secretary of State, which does not purport to be against him individually in order to avoid a trespass or other personal wrong, would on its face be a suit against the United States, as the party against which the relief asked would effectively operate. *In re Ayers*, 123 U. S. 443. It is

[1] Act of June 14, 1934, c. 512, 48 Stat. 955, as amended (28 U. S. C. § 400).

true that both this objection, and the objection that the courts may not interfere with the discretion of the executive department, are inapplicable to a suit in mandamus to compel the performance in accordance with a plain official duty, of a ministerial act. *Board of Liquidation et al.* v. *McComb*, 92 U. S. 531, 541; *In re Ayers*, 123 U. S. 443, 506. But it is submitted that the present case is not one in which, on sound principles, relief by way of mandamus may properly be granted.

The contention of petitioner Elg (Br. 56) seems to be that this case falls within the familiar mandamus rule that a court may compel an executive officer to assume jurisdiction over a cause. The short answer is that defendant Hall did assume jurisdiction over plaintiff's application for a passport. He considered his power in the matter, and decided that he had no power. Whether or not he actually had power in the matter, whether or not plaintiff Elg is a United States citizen, certainly constitutes a doubtful question of law, and one which is argued by both parties in No. 454. The case is therefore one for the application of the familiar rule that where the duty of an officer depends upon a doubtful question of law, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus. *Wilbur* v. *United States*, 281 U. S. 206, 219; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543. And the doctrine applies with all vigor even though the ruling of the officer denied

his own authority to act in the premises. See *United States ex rel, Chi., Gt. Western R. Co.* v. *Interstate Commerce Commission*, 294 U. S. 50, 63:

> * * * Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the statutory power of an administrative officer or body.

2. In any event, the Declaratory Judgment Act leaves room for denial of relief in the sound discretion of the Court. *Aetna Casualty & Surety Co.* v. *Quarles*, 92 F. (2d) 321, 324 (C. C. A. 4th), and cases cited. In the present case, since Secretary Hull will consider himself bound by the ruling of this Court as to the United States citizenship of plaintiff Elg, it is submitted that the exercise of a sound discretion should not require that formal relief be directed against defendant Hull. It would seem that this situation existed at the time the trial court rendered its judgment, but in any event it exists at the present time, and, by analogy to principles of equity, the Court should determine whether or not to reverse the lower court and to grant declaratory relief according to the circumstances as of the present time. See *Landis* v. *North American Co.*, 299 U. S. 248, 258.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939

SUPREME COURT OF THE UNITED STATES.

Nos. 454, 455.—October Term, 1938.

Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, Petitioners,
454 vs.
Marie Elizabeth Elg.

Marie Elizabeth Elg, Petitioner,
455 vs.
Frances Perkins, Secretary of Labor, and Edward J. Shaughnessy, Acting Commissioner of Immigration and Naturalization, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the District of Columbia.

[May 29, 1939.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The question is whether the plaintiff, Marie Elizabeth Elg, who was born in the United States of Swedish parents then naturalized here, has lost her citizenship and is subject to deportation because of her removal during minority to Sweden, it appearing that her parents resumed their citizenship in that country but that she returned here on attaining majority with intention to remain and to maintain her citizenship in the United States.

Miss Elg was born in Brooklyn, New York, on October 2, 1907. Her parents, who were natives of Sweden, emigrated to the United States sometime prior to 1906 and her father was naturalized here in that year. In 1911, her mother took her to Sweden where she continued to reside until September 7, 1929. Her father went to Sweden in 1922 and has not since returned to the United States. In November, 1934, he made a statement before an American consul in Sweden that he had voluntarily expatriated himself for the reason that he did not desire to retain the status of an American citizen and wished to preserve his allegiance to Sweden.

In 1923, shortly before Miss Elg became twenty-one years of age, she inquired of an American consul in Sweden about returning to the United States and was informed that if she returned after attaining majority she should seek an American passport. In 1929, within eight months after attaining majority, she obtained an American passport which was issued on the instructions of the Secretary of State. She then returned to the United States, was admitted as a citizen and has resided in this country ever since.

In April, 1935, Miss Elg was notified by the Department of Labor that she was an alien illegally in the United States and was threatened with deportation. Proceedings to effect her deportation have been postponed from time to time. In July, 1936, she applied for an American passport but it was refused by the Secretary of State upon the sole ground that he was without authority to issue it because she was not a citizen of the United States.

Thereupon she began this suit against the Secretary of Labor, the Acting Commissioner of Immigration and Naturalization, and the Secretary of State to obtain (1) a declaratory judgment that she is a citizen of the United States and entitled to all the rights and privileges of citizenship, and (2) an injunction against the Secretary of Labor and the Commissioner of Immigration restraining them from prosecuting proceedings for her deportation, and (3) an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she is not a citizen.

The defendants moved to dismiss the complaint, asserting that plaintiff was not a citizen of the United States by virtue of the Naturalization Convention and Protocol of 1869 (proclaimed in 1872) between the United States and Sweden (17 Stat. 809) and the Swedish Nationality Law, and Section 2 of the Act of Congress of March 2, 1907, 8 U. S. C. 17. The District Court overruled the motion as to the Secretary of Labor and the Commissioner of Immigration and entered a decree declaring that the plaintiff is a native citizen of the United States but directing that the complaint be dismissed as to the Secretary of State because of his official discretion in the issue of passports. On cross appeals, the Court of Appeals affirmed the decree. 99 F. (2d) 408. Certiorari was granted, December 5, 1938.

First.—On her birth in New York, the plaintiff became a citizen of the United States. Civil Rights Act of 1866, 14 Stat. 27; Fourteenth Amendment, Section 1; *United States* v. *Wong Kim Ark*, 169 U. S. 649. In a comprehensive review of the principles and

authorities governing the decision in that case—that a child born here of alien parentage becomes a citizen of the United States—the Court adverted to the "inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship." *United States* v. *Wong Kim Ark*, *supra*, p. 668. As municipal law determines how citizenship may be acquired, it follows that persons may have a dual nationality.[1] And the mere fact that the plaintiff may have acquired Swedish citizenship by virtue of the operation of Swedish law, on the resumption of that citizenship by her parents, does not compel the conclusion that she has lost her own citizenship acquired under our law. As at birth she became a citizen of the United States, that citizenship must be deemed to continue unless she has been deprived of it through the operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

Second.—It has long been a recognized principle in this country that if a child born here is taken during minority to the country of his parents' origin, where his parents resume their former allegiance, he does not thereby lose his citizenship in the United States provided that on attaining majority he elects to retain that citizenship and to return to the United States to assume its duties.[2]

This principle was clearly stated by Attorney General Edwards Pierrepont in his letter of advice to the Secretary of State, Hamilton Fish, in *Steinkauler's Case*, 15 Op. Attys. Gen'l, 15 (1875). The facts were these: One Steinkauler, a Prussian subject by birth, emigrated to the United States in 1848, was naturalized in 1854, and in the following year had a son who was born in St. Louis. Four years later Steinkauler returned to Germany taking this child and became domiciled at Weisbaden where they continuously resided. When the son reached the age of twenty years the German Government called upon him to report for military duty and his father then invoked the intervention of the American Legation on the ground that his son was a native citizen of the

[1] Oppenheim's International Law, Vol. I, Sec. 308; Moore, International Law Digest, Vol. III, p. 518; Hyde, International Law, Vol. I, Sec. 372; Flournoy, Dual Nationality and Election, 30 Yale Law Journal, 546; Borchard, Diplomatic Protection of Citizens Abroad, Sec. 253; Van Dyne, Citizenship of the United States, p. 25; Fenwick, International Law, p. 165.

[2] Hyde, *op cit.*, Secs. 374, 375; Borchard, *op cit.*, Sec. 259; Van Dyne, *op cit.*, pp. 25-31; Moore, Int. Law Dig., Vol. III, pp. 532-551.

United States. To an inquiry by our Minister, the father declined to give an assurance that the son would return to this country within a reasonable time. On reviewing the pertinent points in the case, including the Naturalization Treaty of 1868 with North Germany, the Attorney General reached the following conclusion:

"Young Steinkauler is a native-born American citizen. There is no law of the United States under which his father or any other person can deprive him of his birthright. He can return to America at the age of twenty-one, and in due time, if the people elect, he can become President of the United States; but the father, in accordance with the treaty and the laws, has renounced his American citizenship and his American allegiance and has acquired for himself and his son German citizenship and the rights which it carries and he must take the burdens as well as the advantages. The son being domiciled with the father and subject to him under the law during his minority, and receiving the German protection where he has acquired nationality and declining to give any assurance of ever returning to the United States and claiming his American nationality by residence here, I am of the opinion that he cannot rightly invoke the aid of the Government of the United States to relieve him from military duty in Germany during his minority. But I am of opinion that when he reaches the age of twenty-one years he can then elect whether he will return and take the nationality of his birth with its duties and privileges, or retain the nationality acquired by the act of his father. This seems to me to be 'right reason' and I think it is law".

Secretary William M. Evarts, in 1879, in an instruction to our Minister to Germany with respect to the status of the brothers Boisseliers who were born in the United States of German parentage said:[3]

"Their rights rest on the organic law of the United States. . . . Their father, it is true, took them to Schleswig when they were quite young, the one four and the other two years old. They lived there many years, but during all those years they were minors, and during their minority they returned to the United States; and now, when both have attained their majority, they declare for their native allegiance and submit themselves to the jurisdiction of the country where they were born and of which they are native citizens. Under these circumstances this Government cannot recognize any claim to their allegiance or their liability to military service, put forth on the part of Germany, whatever may be the municipal law of Germany under which such claim may be asserted by that Government".

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[3] Moore, Int. Law Dig., Vol. III, p. 543.

Secretary Evarts gave a similar instruction in 1880 with respect to a native citizen of Danish parentage who having been taken abroad at an early age claimed American citizenship on attaining his majority, saying:[4]

"He lost no time when he attained the age of majority, in declaring that he claimed the United States as his country and that he considered himself a citizen of the United States. He appears to have adhered to this choice ever since and now declares it to be his intention to return to this country and reside here permanently. His father's political status (whether a citizen of the United States or a Danish subject) has no legal or otherwise material effect on the younger P———s' rights of citizenship".

Secretary Thomas F. Bayard, in answer to an inquiry by the Netherlands Legation whether one born in the United States, of Dutch parents, who during minority had been taken back to the Netherlands by his father, on the latter's resumption of permanent residence there, was an American citizen, answered:[5]

"But the general view held by this Department is that a naturalized American citizen by abandonment of his allegiance and residence in this country and a return to the country of his birth, *animo manendi*, ceases to be a citizen of the United States; and that the minor son of a party described as aforesaid, who was born in the United States during the citizenship there of his father, partakes during his legal infancy of his father's domicile, but upon becoming *sui juris* has the right to elect his American citizenship, which will be best evidenced by an early return to this country.

"This right so to elect to return to the land of his birth and assume his American citizenship could not, with the acquiescence of this Government, be impaired or interfered with."

In 1906, a memorandum, prepared in the Department of State by its law officer, was sent by the Acting Secretary of State, Robert Bacon, to the German Ambassador as covering "the principles" upon which the Department had acted. In this memorandum it was said:[6]

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[4] Moore, Int. Law. Dig., Vol. III, p. 544.

[5] Foreign Relations, 1888, Pt. 2, p. 1341. See, also, Mr. Bayard, Secretary of State to Mr. McLane (1888), to Count Sponneck, Danish Minister (1888); Moore, Int. Law Dig., Vol. III, p. 548; Mr. Olney, Secretary of State, to Mr. Materne, 1896; Moore, Int. Law Dig., Vol. III, p. 542; United States ex rel. Schimeca v. Husband, 6 F. (2d) 957, 958.

[6] Foreign Relations, 1906, p. 657. See, also, "Compilation of Certain Departmental Circulars" relating to citizenship, etc., issued by Department of State, 1925, containing instructions to Diplomatic and Consular Officers under date of November 24, 1923, pp. 118, 121, 122; United States ex rel. Baglivo v. Day, 28 F. (2d) 44.

"Assuming that Alexander Bohn [the father] never became a citizen of the United States, Jacob Bohn [the son] was born of German parents in the United States. According to the Constitution and laws of the United States as interpreted by the courts, a child born to alien parents in the United States is an American citizen, although such child may also be a citizen of the country of his parents according to the law of that country.

"Although there is no express provision in the law of the United States giving election of citizenship in such cases, this department has always held in such circumstances that if a child is born of foreign parents in the United States, and is taken during minority to the country of his parents, such child upon arriving of age, or within a reasonable time thereafter, must make election between the citizenship which is his by birth and the citizenship which is his by parentage. In case a person so circumstanced elects American citizenship he must, unless in extraordinary circumstances, in order to render his election effective, manifest an intention in good faith to return with all convenient speed to the United States and assume the duties of citizenship".[7]

We have quoted liberally from these rulings—and many others might be cited—in view of the contention now urged by the petitioners in resisting Miss Elg's claim to citizenship. We think that they leave no doubt of the controlling principle long recognized by this Government. That principle, while administratively applied, cannot properly be regarded as a departmental creation independently of the law. It was deemed to be a necessary consequence of the constitutional provision by which persons born within the United States and subject to its jurisdiction become citizens of the United States. To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and who during minority is incapable of a binding choice.

Petitioners stress the American doctrine relating to expatriation. By the Act of July 27, 1868,[8] Congress declared that "the right of expatriation is a natural and inherent right of all people". Expatriation is the voluntary renunciation or abandonment of nationality and allegiance.[9] It has no application to the

[7] See also, Mr. Uhl, Acting Secretary of State to Mr. Rudolph, May 22, 1895, 202 MS. Dom. Let. 298; Moore, Int. Law Dig., Vol. III, p. 534.

[8] 15 Stat. 223.

[9] Van Dyne, *op. cit.*, p. 269; Borchard, *op. cit.*, Sec. 315; Hyde, *op. cit.*, Sec. 376.

removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking. That right is fittingly recognized where a child born here, who may be, or may become, subject to a dual nationality, elects on attaining majority citizenship in the country to which he has been removed. But there is no basis for invoking the doctrine of expatriation where a native citizen who is removed to his parents' country of origin during minority returns here on his majority and elects to remain and to maintain his American citizenship. Instead of being inconsistent with the right of expatriation, the principle which permits that election conserves and applies it.

The question then is whether this well recognized right of election has been destroyed by treaty or statute.

Third.—Petitioners invoke our treaty with Sweden of 1869.[10] This treaty was one of a series of naturalization treaties with similar terms, which were negotiated with various countries between 1868 and 1872.[11] The relevant portions of the text of the treaty with Sweden, and of the accompanying protocol, are set forth in the margin.[12] The treaty manifestly deals with expatria-

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[10] 17 Stat. 809.

[11] North German Confederation, 1868, 15 Stat. 615; Bavaria, 1868, 15 Stat. 661; Baden, 1868, 16 Stat. 731; Württemberg, 1868, 16 Stat. 735; Hesse, 1868, 16 Stat. 743; Belgium, 1868, 16 Stat. 747; Great Britain, 1870, 16 Stat. 775; Austria-Hungary, 1870, 17 Stat. 833; Denmark, 1872, 17 Stat. 941. See Flournoy and Hudson, Nationality Laws, pp. 661-673; Moore, Int. Law Dig., Vol. III, p. 358.

[12] The treaty provides:

"The President of the United States of America and His Majesty the King of Sweden and Norway, led by the wish to regulate the citizenship of those persons who emigrate from the United States of America to Sweden and Norway and their dependencies and territories, and from Sweden and Norway to the United States of America, have resolved to treat on this subject, and have for that purpose appointed plenipotentiaries to conclude a convention, . . . who have agreed to and signed the following articles:

"Article I. Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

"Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired.

"Article III. If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country

tion and the recognition of naturalization by the respective powers. The recital states its purpose; that is, "to regulate the citizenship of those persons who emigrate" to one country from the other. The terms of the treaty are directed to that purpose and are appropriate to the recognition of the status of those who voluntarily take up their residence for the prescribed period in the country to which they emigrate. Article I of the treaty provides:

"Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are lawfully recognized as citizens of Sweden or Norway, shall be held by the government of the United States to be Swedish or Norwegian citizens, and shall be treated as such.

"Reciprocally, citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the government of Sweden and Norway to be American citizens, and shall be treated as such.

"The declaration of an intention to become a citizen of one or the other country has not for either party the effect of citizenship legally acquired".

We think that this provision in its direct application clearly implies a voluntary residence and it would thus apply in the instant case to the father of respondent. There is no specific mention of minor children who have obtained citizenship by birth in the coun-

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and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper".

The protocol containing "the following observations, more exactly defining and explaining the contents" of the convention provides:

"I. Relating to the first article of the convention.

"It is understood that if a citizen of the United States of America has been discharged from his American citizenship, or, on the other side, if a Swede or a Norwegian has been discharged from his Swedish or Norwegian citizenship, in the manner legally prescribed by the government of his original country, and then in the other country in a rightful and perfectly valid manner acquires citizenship, then an additional five years' residence shall no longer be required; but a person who has in that manner been recognized as a citizen of the other country shall, from the moment thereof, be held and treated as a Swedish or Norwegian citizen, and, reciprocally, as a citizen of the United States.

"III. Relating to the third article of the convention.

"It is further agreed that if a Swede or Norwegian, who has become a naturalized citizen of the United States, renews his residence in Sweden or Norway without the intent to return to America, he shall be held by the government of the United States to have renounced his American citizenship.

"The intent not to return to America may be held to exist when the person so naturalised resides more than two years in Sweden or Norway".

try which their parents have left. And if it be assumed that a child born in the United States would be deemed to acquire the Swedish citizenship of his parents through their return to Sweden and resumption of citizenship there,[13] still nothing is said in the treaty which in such a case would destroy the right of election which appropriately belongs to the child on attaining majority. If the abrogation of that right had been in contemplation, it would naturally have been the subject of a provision suitably explicit. Rights of citizenship are not to be destroyed by an ambiguity. Moreover, the provisions of Article III must be read in connection with Article I. Article III provides:

"If a citizen of the one party, who has become a recognized citizen of the other party, takes up his abode once more in his original country and applies to be restored to his former citizenship, the government of the last-named country is authorized to receive him again as a citizen on such conditions as the said government may think proper".

If the first article could be taken to cover the case of a child through the derivation of citizenship from that of his emigrating parents, Article III by the same token would be applicable to the case of a child born here and taken to Sweden, who at majority elects to return to the United States and to assume the privileges and obligations of American citizenship. In that event, the Government of the United States is expressly authorized to receive one so returning "as a citizen on such conditions as the said government may think proper". And if this Government considers that a native citizen taken from the United States by his parents during minority is entitled to retain his American citizenship by electing at majority to return and reside here, there would appear to be nothing in the treaty which would gainsay the authority of the United States to recognize that privilege of election and to receive the returning native upon that basis. Thus, on the facts of the present case, the treaty does not purport to deny to the United States the right to treat respondent as a citizen of the United States, and it necessarily follows that, in the absence of such a denial, the treaty cannot be set up as a ground for refusing to accord to respondent the rights of citizenship in accordance with our Constitution and laws by virtue of her birth in the United States.

[13] Compare Secretary Hay to Mr. Harris, Foreign Relations, 1900, p. 13.

Nor do we find anything in the terms of the protocol, accompanying the treaty, which can be taken to override the right of election which respondent would otherwise possess. Article III of the protocol refers to the case of a Swede who has become a naturalized citizen of the United States and later renews his residence in Sweden "without the intent to return to America". And it provides that the intent not to return may be held to exist when the person "so naturalized" resides more than two years in Sweden. This does not appear to be applicable to respondent, who was born in the United States, but, apart from that, the intent not to return could not properly be attributed to her during minority, and if it were so attributed, the presumption would be rebutted by the election to return to the United States at majority. Compare *United States* v. *Howe*, 231 Fed. 546, 549.[14]

The views we have expressed find support in the construction placed upon the naturalization treaties of 1868 to 1872[15] in the period following their ratification. The first of those treaties was made in 1868 with the North German Confederation[16] and contained provisions similar to those found in the treaty with Sweden. But it was under this German treaty that Steinkauler's case arose in 1875, to which we have already referred, where Attorney General Pierrepont upheld the right of election, saying:[17] "Under the treaty, and in harmony with the American doctrine, it is clear that Steinkauler, the father, abandoned his naturalization in America and became a German subject (his son being yet a minor) and that by virtue of German laws the son acquired German nationality. It is equally clear that the son by birth has American nationality; and hence he has two nationalities, one natural, the other acquired. . . . There is no law of the United States under which his father or any other person can deprive him of his birthright". To the same effect, as to the right of election, was the

[14] While the nationality law of Sweden is not to be regarded as controlling unless the treaty makes it so—which we have found is not the case—it may be observed that it is not clear that the law of Sweden would operate so as to preclude recognition that respondent is a citizen of the United States. See the Swedish law of 7 May, 1909, Art. 8. That, however, is a question of foreign law which we find it unnecessary to attempt to determine.

[15] See Note 10.

[16] 15 Stat. 615. See Terlinden v. Ames, 184 U. S. 270, 283, 284.

[17] 15 Op. Attys. Gen'l. 15, 17, 18.

ruling of Secretary Evarts in 1879 in his instruction, above quoted, to our minister to Germany with respect to the brothers Boisseliers.[18]

There were provisions, similar to those in the treaty with Sweden in the naturalization treaty with Denmark of 1872,[19] but Secretary Evarts evidently did not regard those provisions as inconsistent with the claim, which he sustained, of one born here of Danish parentage who was taken abroad by his parents but insisted upon his American citizenship when he arrived at his majority.[20] These rulings, following closely upon the negotiation of these naturalization treaties, show beyond question that the treaties were not regarded as abrogating the right of election for which respondent here contends.

Later rulings were to the same effect. Thus, in 1890, in dealing with a native American citizen who, upon his own application, had been admitted to Danish citizenship during his minority, and who had not yet come of age, the Secretary of State, while recognizing that "when a citizen of the United States voluntarily becomes naturalized or renaturalized in a foreign country, he is to be regarded as having lost his rights as an American citizen", was careful to make the following qualifications in support of the right of election at majority, saying:

"As Mr. Andersen has not yet attained his majority, the Department is not prepared to admit that proceedings taken on his behalf in Denmark during his minority would deprive him of his right, upon reaching the age of twenty-one years, to elect to become an American citizen by immediately returning to this country to resume his allegiance here".[21]

Petitioners refer to an instruction by Secretary Sherman in 1897[22] in answer to a question as to the effect of a person's return to his native country for a visit on his rights as an American citizen which had been acquired through the naturalization of his father. While Secretary Sherman recognized "the acquisition of United States citizenship by an alien-born minor through the lawful

[18] Moore, Int. Law Dig., Vol. III, p. 543.

[19] 17 Stat. 941.

[20] Moore, Int. Law Dig., Vol. III, p. 544.

[21] Mr. Wharton, Acting Secretary of State, to Count Sponneck, Danish Minister (1890); Moore, Int. Law Dig., p. 715.

[22] Secretary Sherman to Mr. Grip, Swedish Minister, June 15, 1897; Moore, Int. Law Dig., Vol. III, p. 472; 8 MS., Notes to Sweden, 58.

naturalization of his father under the operation of Section 2172, Revised Statutes", the Secretary added the following:

"If such a party having thus become a recognized citizen of the United States, takes up his abode once more in his original country, and applies to be restored to his former citizenship, the government of the last named country is authorized to receive him again as a citizen, on such conditions as the said Government may think proper (Treaty of 1869, Article III). Or he may by residence in the country of origin, without intent to return to the United States, be held to have renounced his American citizenship (Protocol, May 26, 1869). But this presumption, like all presumptions of intent, may be rebutted by proof. Until a person so circumstanced shall be held to have voluntarily abandoned his American citizenship, or shall have acquired another citizenship upon application to that end and by due process of law, this Government is entitled to claim his allegiance and constrained to protect him as a citizen so long as he shall be found bona fide entitled thereto".

We find nothing in that instruction which is inconsistent with the maintenance of respondent's right of election in the instant case. So far as the instructio. in relation to a naturalized minor may be deemed to be pertinent, it confirms rather than opposes respondent's right to be considered an American citizen.

That the Department of State continued to maintain the right of election is further shown by the memorandum of applicable principles which it issued in 1906, above quoted, to the effect that the Department had "always held in such circumstances that if a child is born of foreign parents in the United States, and is taken during minority to the country of his parents, such child upon arriving of age, or within a reasonable time thereafter, must make election between the citizenship which is his by birth and the citizenship which is his by parentage".[23]

Fourth.—We think that petitioners' contention under Section 2 of the Act of March 2, 1907,[24] is equally untenable. That statutory provision is as follows:

"That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be

[23] Foreign Relations, 1906, p. 657.

[24] 34 Stat. 1228; 8 U. S. C. 17.

an American citizen, and the place of his general abode shall be deemed his place of residence during said years: *Provided, however,* That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: *And provided also,* That no American citizen shall be allowed to expatriate himself when this country is at war".[25]

Petitioners contend that respondent's acquisition of derivative Swedish citizenship makes her a person who has been "naturalized under Swedish law", and that therefore "she has lost her American citizenship" through the operation of this statute. We are unable to accept that view. We think that the statute was aimed at a voluntary expatriation and we find no evidence in its terms that it was intended to destroy the right of a native citizen, removed from this country during minority, to elect to retain the citizenship acquired by birth and to return here for that purpose. If by virtue of derivation from the citizenship of one's parents a child in that situation can be deemed to have been naturalized under the foreign law, still we think in the absence of any provision to the contrary that such naturalization would not destroy the right of election.

It should also be noted that the Act of 1907 in Sections 5 and 6[25] has specific reference to children born without the United States of alien parents but says nothing as to the loss of citizenship by minor children born in the United States.

That in the latter case the child was not deemed to have lost his American citizenship by virtue of the terms of the statute but might still with reasonable promptness on attaining majority manifest his election is shown by the views expressed in the instructions issued

[25] Sections 5 and 6 of this statute should also be noted as they contain provisions applicable to minor children. They are as follows:

"Sec. 5. That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: *Provided,* That such naturalization or resumption takes place during the minority of such child: *And provided further,* That the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States.

"Sec. 6. That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority".

[26] See Note 25.

under date of November 24, 1923, by the Department of State to the American Diplomatic and Consular Officers.[27] These instructions dealt with the questions arising under the citizenship act of March 2, 1907, and cases of dual nationality. It was stated that it was deemed desirable "to inform diplomatic and consular officers of the department's conclusions, for their guidance in handling individual cases". Commenting on dual nationality the instructions said:

"The term 'dual nationality' needs exact appreciation. It refers to the fact that two States make equal claim to the allegiance of an individual at the same time. Thus, one State may claim his allegiance because of his birth within its territory, and the other because at the time of his birth in foreign territory his parents were its nationals. The laws of the United States purport to clothe persons with American citizenship by virtue of both principles."

And after referring to the Fourteenth Amendment and the Act of February 2, 1855, R. S. 1993, the instructions continued:

"It thus becomes important to note how far these differing claims of American nationality are fairly operative with respect to persons living abroad, whether they were born abroad or were born in the United States of alien parents and taken during minority to reside in the territory of States to which the parents owed allegiance. It is logical that, while the child remains or resides in territory of the foreign State claiming him as a national, the United States should respect its claim to allegiance. The important point to observe is that the doctrine of dual allegiance ceases, in American contemplation, to be fully applicable after the child has reached adult years. Thereafter two States may in fact claim him as a national. Those claims are not, however, regarded as of equal merit, because one of the States may then justly assert that his relationship to itself as a national is, by reason of circumstances that have arisen, inconsistent with, and reasonably superior to, any claim of allegiance asserted by any other State. Ordinarily the State in which the individual retains his residence after attaining his majority has the superior claim. The statutory law of the United States affords some guidance but not all that could be desired, because it fails to announce the circumstances when the child who resides abroad within the territory of a State reasonably claiming his allegiance forfeits completely the right to perfect his inchoate right to retain American citizenship. The department must, therefore, be reluctant to declare that particular conduct on the part of a person after reaching adult years in foreign territory produces a forfeiture or something equivalent to expatriation.

[27] "Compilation of Certain Departmental Circulars" relating to citizenship, etc., issued by Department of State, 1925, containing instructions to diplomatic and consular officers under date of November 24, 1923, pp. 118, 121, 122.

"The statute does, however, make a distinction between the burden imposed upon the person born in the United States of foreign parents and the person born abroad of American parents. With respect to the latter, section 6 of the Act of March 2, 1907, lays down the requirement that, as a condition to the protection of the United States, the individual must, upon reaching the age of 18, record at an American consulate an intention to remain a citizen of the United States, and must also take an oath of allegiance to the United States upon attaining his majority.

"The child born of foreign parents in the United States who spends his minority in the foreign country of his parents' nationality is not expressly required by any statute of the United States to make the same election as he approaches or attains his majority. It is, nevertheless, believed that his retention of a right to demand the protection of the United States should, despite the absence of statute, be dependent upon his convincing the department within a reasonable period after the attaining of his majority of an election to return to the United States, there to assume the duties of citizenship. In the absence of a definite statutory requirement, it is impossible to prescribe a limited period within which such election should be made. On the other hand, it may be asserted negatively that one who has long manifested no indication of a will to make such an election should not receive the protection of the United States save under the express approval of the department".

It thus appears that as late as 1925, when the Department issued its "Compilation" including the circular instruction of November 24, 1923, it was the view of the Department of State that the Act of March 2, 1907, had not taken away the right of a native citizen on attaining majority to retain his American citizenship, where he was born in the United States of foreign parents. We do not think that it would be a proper construction of the Act to hold that while it leaves untouched the right of election on the part of a child born in the United States, in case his parents were foreign nationals at the time of his birth and have never lost their foreign nationality, still the statute should be treated as destroying that right of election if his parents became foreign nationals through naturalization. That would not seem to be a sensible distinction. Having regard to the plain purpose of Section 2 of the Act of 1907, to deal with voluntary expatriation, we are of the opinion that its provisions do not affect the right of election, which would otherwise exist, by reason of a wholly involuntary and merely derivative naturalization in another country during minority. And, on

the facts of the instant case, this view apparently obtained when in July, 1929, on the instructions of the Secretary of State, the Department issued the passport to respondent as a citizen of the United States.

But although respondent promptly made her election and took up her residence in this country accordingly, and had continued to reside here, she was notified in April, 1935, that she was an alien and was threatened with deportation.

When, precisely, there occurred a change in the departmental attitude is not clear.[28] It seems to have resulted in a conflict with the opinion of the Solicitor of the Department of Labor in the case of Ingrid Therese Tobiassen, and the Secretary of Labor because of that conflict requested the opinion of the Attorney General, which was given on June 16, 1932.[29] It appeared that Miss Tobiassen, aged 20, was born in New York in 1911; that her father, a native of Norway, became a citizen of the United States by naturalization in 1912; that in 1919 Miss Tobiassen was taken by her parents to Norway where the latter had since resided; that at the age of 18 she returned to the United States and took up her permanent residence in New Jersey. The question arose when she asked for a return permit to visit her parents. The Department of State refused to issue a passport on the ground that Miss Tobiassen had acquired Norwegian nationality and had ceased to be an American citizen. The Attorney General's opinion approved that action.

His opinion quoted the provisions of the treaty with Sweden and Norway of 1869[30] and referred to the Norwegian Nationality Law of August 8, 1924, and to the provisions of the Act of Congress of March 2, 1907. The opinion noted that the claim that Miss Tobiassen had ceased to be an American citizen did "not rest upon the terms of the Naturalization Treaty with Norway, but upon a law of that country, as a result of the renunciation by her father, a native of Norway, of his American citizenship, and the resumption of his Norwegian nationality in pursuance of the terms of that treaty". The law of Norway was deemed to be analogous to our statutes "by virtue of which foreign-born minor children of persons

[28] That there had been a change is frankly stated in the communication (a copy of which is annexed to the complaint) addressed by the American Consul at Göteborg, Sweden, to the respondent's father under date of October 29, 1935.

[29] 36 Op. Attys. Gen'l, p. 535.

[30] Cited as of June 14, 1871, the date of the exchange of ratifications.

naturalized in the United States are declared to be citizens of this country"; and hence the conclusion that Miss Tobiassen having acquired Norwegian nationality had in consequence ceased to be an American citizen was said to be correct.

The opinion does not discuss the right of election of a native citizen of the United States when he becomes of age to retain American citizenship and does not refer to the repeated rulings of the Department of State in recognition of that right, the exercise of which, as we have pointed out, should not be deemed to be inconsistent with either treaty or statute. We are reluctant to disagree with the opinion of the Attorney General, and we are fully conscious of the problems incident to dual nationality and of the departmental desire to limit them, but we are compelled to agree with the Court of Appeals in the instant case that the conclusions of that opinion are not adequately supported and are opposed to the established principles which should govern the disposition of this case.[31]

Nor do we think that recent private acts of Congress[32] for the relief of native citizens who have been the subject of administrative action denying their rights of citizenship, can be regarded as the equivalent of an Act of Congress providing that persons in the situation of the respondent here have lost the American citizenship which they acquired at birth and have since duly elected to retain. No such statute has been enacted.

We conclude that respondent has not lost her citizenship in the United States and is entitled to all the rights and privileges of that citizenship.

Fifth.—The cross petition of Miss Elg, upon which certiorari was granted in No. 455, is addressed to the part of the decree below which dismissed the bill of complaint as against the Secretary of State. The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to

[31] The same may be said of the opinion of the Circuit Court of Appeals of the Ninth Circuit in United States *v.* Reid, 73 F. (2d) 153 (certiorari denied upon the ground that the application was not made within the time provided by law, 299 U. S. 544), so far as it is urged by petitioners as applicable to the facts of the instant case.

[32] Act of July 13, 1937, 50 Stat. Pt. 2, p. 1030; Act of June 25, 1938 (Private No. 751, 75th Cong., 3d Sess.).

the allegation of the bill of complaint, had refused to issue a passport to Miss Elg "solely on the ground that she had lost her native born American citizenship". The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227), declared Miss Elg "to be a natural born citizen of the United States" and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.

The decree will be modified accordingly so as to strike out that portion which dismisses the bill of complaint as to the Secretary of State, and so as to include him in the declaratory provision of the decree, and as so modified the decree is affirmed.

It is so ordered.

Mr. Justice DOUGLAS took no part in the consideration and decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.